





Presented to the
Litchfield Historical Society
By
Samuel A. Herman
Winsted
Conn

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Brittle pages
☐ Brittle binding

John Brown & Martha Wiggins
most common - Jackson Seneca Ind
Remotely known L. Ind -

A circular address to B with con-
nants of Seneca & Wiggins which did
he deliver over to C to be delivered
to B. ^{note} Seneca Ind Wiggins
privilege of receiving it if he pleases
before he dies. He writes as in the
margin his life & dies without receiv-
ing -

Before his death B executed a
will of the same proceeds with the con-
nants of Seneca & Wiggins to John
other Seneca - At his death B received
it's will from C but never comes
into possession - After his death there was no
revelation of B's will to John & he
takes immediate possession - The will
is a full creative gift now with the

The Law - even in this respect
Migdon.

John for Piff

Comp 2004 = "There can be but one expectation to
Berk 150 "be" "I did not receive that title
he the first head by the law - 2nd

Berk 130 "There needs no recognition or separation
in this and in delivery" 1st - 130 del
He the duty as it is prepared

Croft 47 2nd delivery good because he had no
right at the place. There was a delivery

Pac 150 "cannot grant an inchoate right

" 160 - Good when enactment void
" 165 - as legal construction is void as "

Relation

Bal 197 "No relation where there is an inchoate
La 180 "guilty" carrying right of
an inchoate right in carriage

2 Fork "Relation does not affect collateral
30 "acts" as need a coll. act

Long 88 "All these deliveries are one entire act
No perfect title can be given until the
act is entire -

7 May 14 Touch 66 2 Ba 654 18 Jan 574 24 260
4 Mar 3 Nelson 21 60 11 Nov 29 11 Jan 432 11 Jan 77
1 Nov 100

Estoppel.

Learned 184 "No estoppel where things in fact's
is done by him who had no right
to do it." B had no right.

7 Coke's 184 "No estoppel except as the law
requires only as him who can take
advantage of it - I suppose some
exceptions - (exceptions)" "Things
are not estopped"

184 "But not estopped because it
had no title to" - go for a while
(to be)

No fiction in law not in fact
3rd Person -

The actions of C to B does not
prevent the title from acting as a
good title with words of intention
analogy - The title is given to
after removal of his title must
manifest some agent or there
is no confirmation
Again - Had B refused to give the
title even more - This right would have
been for ever gone - & so is it - For
the law of - made him recede
to his own had he been present after the
removal - Had right therefore is gone

paper upon - I believe - I can
not be compelled to convey - I believe
are the only cases prior to 185

Lower Court

On the delivery of deed vested
in title in present - I believe
to act as B. to convey title

27 Mass. 447. "The conveyance of A. to B. took effect from the 1st delivery, by the
453. doctrine of relation - The deed was a deed in present & not an executory.
4 May 66. B. was only a depository who held the deed to the use of B. the grantee."

Gal. H. 233.
9 Bac 52. "at the time of the conveyance to the Deft. - from legal title he had &
Pow. 1856. therefore competent to convey at the time.")

12 Johns 316. II. "If one sells land to A. to which he has no title & then acquires one
by purchase it immediately cures to the benefit of the grantee & goes to him -
from his title"

(So if B. has no title at the time of conveyance to Deft., his
deeds grant title traced to the Deft. - & that, without a redelivery - Thus the
Deft. is deemed invested with the complete title.)

1 Salk 276 III. "Estoppel - The estoppel runs with the land - thus the heir is
4 Com 379 estopped from denying the deed of his ancestor - Parties in law are
estopped."

(The Deft. has a claim ^{in equity must be} to consonant with B's former title,
for they claim in the heir & are estopped in like manner, for the estopped
runs with the land. It seems clearly that equity can have only the
interest of B. at the time of sale brot, which is nothing at all, for in this
case there is no land.)

I David C. J. -

Execution of Brown -
known in - As I do to B was in
the nature of a seizure - His power
of representation shows this - The good
belong communicated by title - indeed
it was consummated by A's death

But here was intimate relation
B had no right to exercise an inheritance
right before A's death - As this deed was
made or completed on A's death as
relation - The title was not by
purchase, it was the title of the first relation
as relation - But this applies
only as to the parties & these representa-
tions as to a relation -
I have no effort for or as relation
the relation relation
B & his representations are complete
the relation of relation relation

& extinguish - But a superior life
relation or estoppel appears. It shows
a superior person - a superior - superior
relations would have been concluded
but not - & estoppel is unimpaired
It is not harmful by it who cannot
take advantage of it -

Relation the nothing to do with
collateral acts - It does not extend
to essential acts - If things
and are concluded the acts are
ended - ended - It is intermedi-
ate & the relation goes to regulate
and the acts as human the acts

On the death in estoppel appears
to harm the conditions - very soon
the acts of the conditions
to have the acts - the acts - not
there are in the acts - the acts
as are the acts -

The conditions of the acts and the acts -
all the acts - the acts the acts

§ 2000
It is to be taken - in relation to the
rights as well as the as to the
facts. all other acts are considered
subject for privilege

§ 2001. on the doctrine of relation.

Exh. 404.
Com. 3. 1844.
Plen. 162.
2 Nov 553
" when he has made the death of his ancestor known
to the public mind he will be relation to him - & may
after he has entered on it in the relation of a trespasser
who comes into the trespass before he enters - for he is
in relation by relation" S. 6.

Exh. 238
9 Nov 62.
Ex. 1000 B.
Nov. 1846
" If the owner is disseised at the time of making a devise but
it is not until it dies since the devise is given. The devise
will be void even if not for the fiction of relation - for he
is supposed to have been disseised at the time after devise" S. 6.

11th Monday 17 Dec

With file - inventory of Library

Offer to L.

Books - General (Luther Albert Lowrey
see Br. item - m. reiso Harv Paul Mrs
note to files

Book Book or quotations
harmonic
situation

Below

Library 3-2-

Library 3-2-

Library 3-2-

Library 3-2-

Library 3-2-

Library 3-2-

Library 3-2-

Below

Library 3-2-

Library 3-2-

Library 3-2-

Library 3-2-

Library 3-2-

The station & etc, has app. than Stiles to dpl in enter
new & collecting & carrying away the grain along with
it, which was rec'd by B. and I call understand

See - Summer - description of the question - seed & summer
I want to see my fair & best of life -
in the year 1877 etc

44 1/2 contents in common

Had unity of interest but not of title

Evans etc 143 - fair as to holding the same - not touching the estate - little

Wants of care in the case of Shonson 152 little & book
sent in common & Shon. Nov 221 little & book

Charles Ed 1843 - father of 10 moving there - not breaking the Code - Little

Parents of same in the case of Stevenson 1852 Little & Free he
went in common shore Nov 221 Jackson

Case of Stewart & Daugherty

Especially for 1850 year
with note did me.

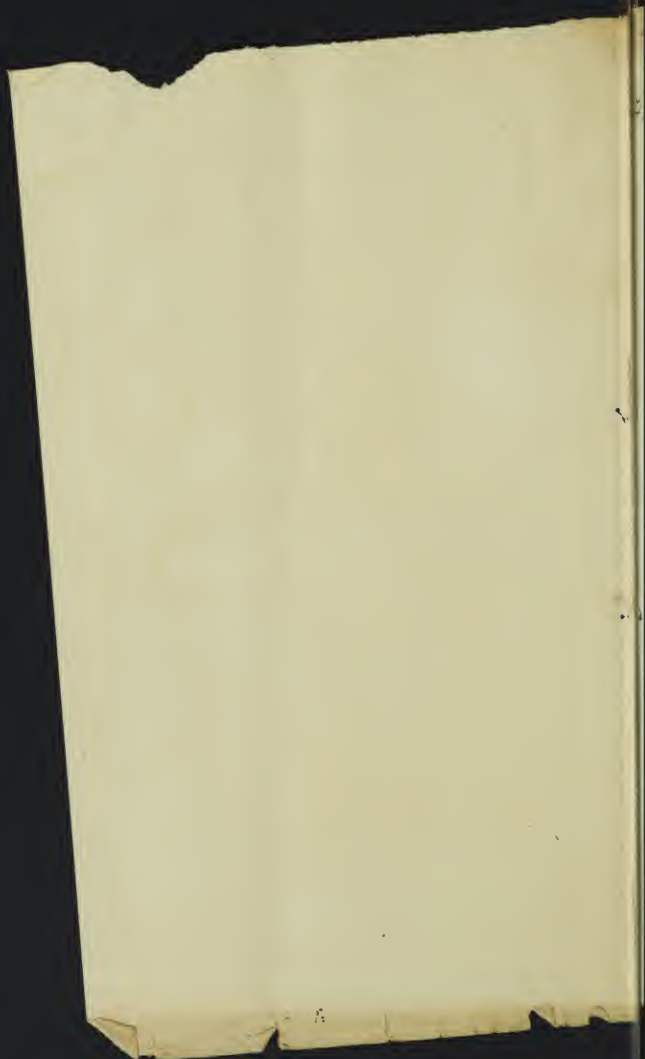
Nine

Had no interest of the work then he arrested & put there but neglected he had lost
the whole husband - shown an abiding language

Had no money of a man who had pushed he could say he showed up
before it was given began same as then - he was as put forward
in the rule of recovery of 18

Had A. Do. - Had wants to recover for his labor - would he see with
see A for - even now - or if A dies for breaking down hands
15 to be paid

It is more even better if 4 months before must it see him



A supposes for some time per. continues in possⁿ 10 yrs possession
by S who continues in possⁿ more. of course S has now lost
his right A now brings Eject^s vs B - can he recover?
Hansford

Strength of his own title -

See vs Barber 25 749 Loper - D says out of a recovery, by
which he forfeited it - a stranger takes possⁿ & keeps it

Graham v Reat - Dies - Plff was absent in possⁿ by a
Lease from a rector who had been absent 5 years
by which the lease was void - Still he may maintain
his possⁿ as a wrongdoer - but not Eject^s (though he been
an usher) for this is a feoffment & remedy founded
on title

See vs Harvey - 2 Mansfield in this action Plff cannot
recover but upon the strength of his own title

He cannot found his claim on the weakness
of Defts title - For possⁿ gives the Deft a right
vs every man who cannot shew a good title

Repeated by T. Aston - in who was charged he possⁿ
must shew make out a good title & Burr 2400
Miles id. - + Post.

Surfto Dig 152 to the point - The last in possⁿ holds

Ed 68 453 - In Eject^s Plff must recover by the
strength of his own title not by the weakness of his
adversarys for whom possⁿ is a good title

So B N 110 Suff^r for ~~the~~ Deft to shew title in an-
other

Doc vs Staple Surreal actions there is no doubt
but that the party must state a legal title
in the record - s. of Gatt 2 5 96 D. Kenyon

1 Chitt PL read last part 1000 & 190 & last part of
192 reg^d of Dec^r

2 Stannic an eve 514 (10) This an inflexible rule that
Plff must recover by the strength of his own title &

2nd case
+ Jackson vs Haden - ^{Chitt} suit not immediately (austn
in Am. R. B., tried in June) before p. Shenece & by
title ruled insufficient (3 years) -
Per curiam - said deft came into mfgs here at the
time and was a question re - "But the case
was on a diff^t point - deft must be considered as
a workman - deft entered upon s'lt fr as a cotton
act "Pop^r" is ^{Calypso} prima facie ev^d of a legal title
in possⁿ - first word of Plff's course & John is
another question entirely -

2 Jackson as Hander & Johnson v 110
Kent of Steamship itself is entitled to recover
he showed a hope of 10 or 10 under a claim
of 7 colour of title -

10 John-
+ Smith v Lorrillard - Keb- Took '39 had built a house
3 years before continued in hope till '95 - driven off by
the enemy - vacant till 95 = 26 years when Dept
took hope = diff 7 years actual hope - Kent - a
near hope short of 20 years under a claim or operation
of right will prevail over a subst hope of less
than 10 years ~~that~~ when neither show good title.

It must however be understood that the prior
Plff did not voluntarily relinquish &c without the
animus revertendi - Dept's subst hope was never
entirely without colour right - Here appears some
a claim in one - a retention of right & no right

As said says Kent - here in legal contemplation
was 26 years hope by Plff i.e. till '95

all these however aside from the long & last
where hope was regarded as all the words with a title

Since this rule was relaxed a little when Plff showed a
near title - & Dept had none - & would not let him

show title in 3^d person

according to the case in 2^d form if B had succeeded as the paper immediately he might have recovered if to act was tortious - but now the assumptions are in C's favor - & B became stranger & unaffected -

Besides there was no right in title in any one till C had kept possession 5 years in title the assumption of possession nor even an inchoate right - But C has kept possession title is acquired - shall B now claim the land & a title note it which was not in existence during his possession to get a complete title by possession - B could certainly revert C's possession & then the possession of title would have been in his favor -

Recover instantly for what he should for title

In case of the question turned on the verdict of unlawful entry

In case of - Burr it was a question whether plff has not shown a complete - & yet he fails







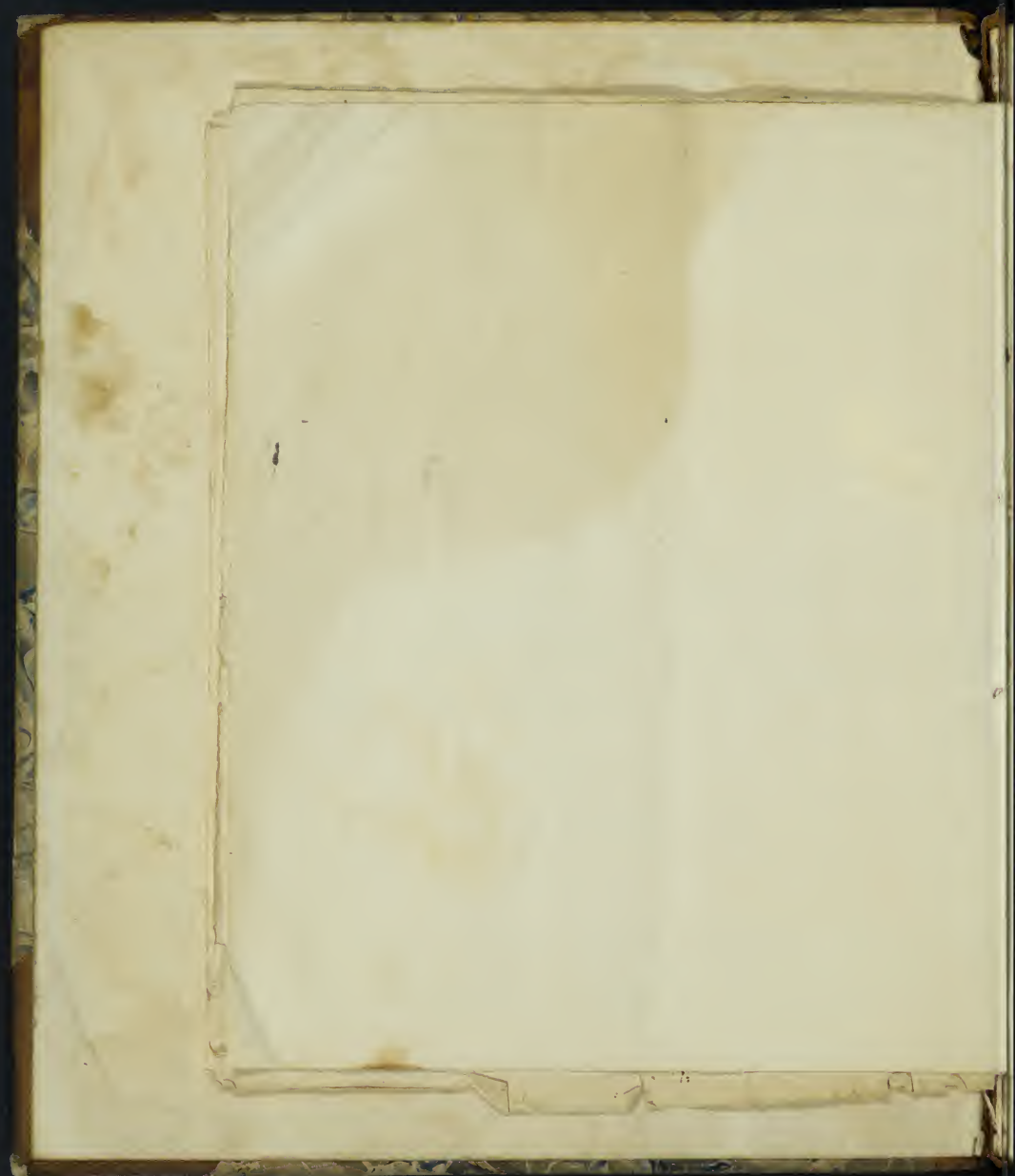
Alfred D.H.

It came in pop^r by a wrongful act
(Cited by John -
Inherent Equality)

Prothas. Hancock)
Judge Louie.

There's still a dispute as to the fundamental
principles of Equity - D.H. must come
by the right of his own title - It cannot be
as B - But there is some relaxation
from the old law - Can one say
now about the marriage of B had not been
a pop^r but 4 years B had been there in title
in another W. of B - The modern law seems
to allow him to get the pop^r to show
that he means better than the old
law has been strictly applied

Wrote for D.H.





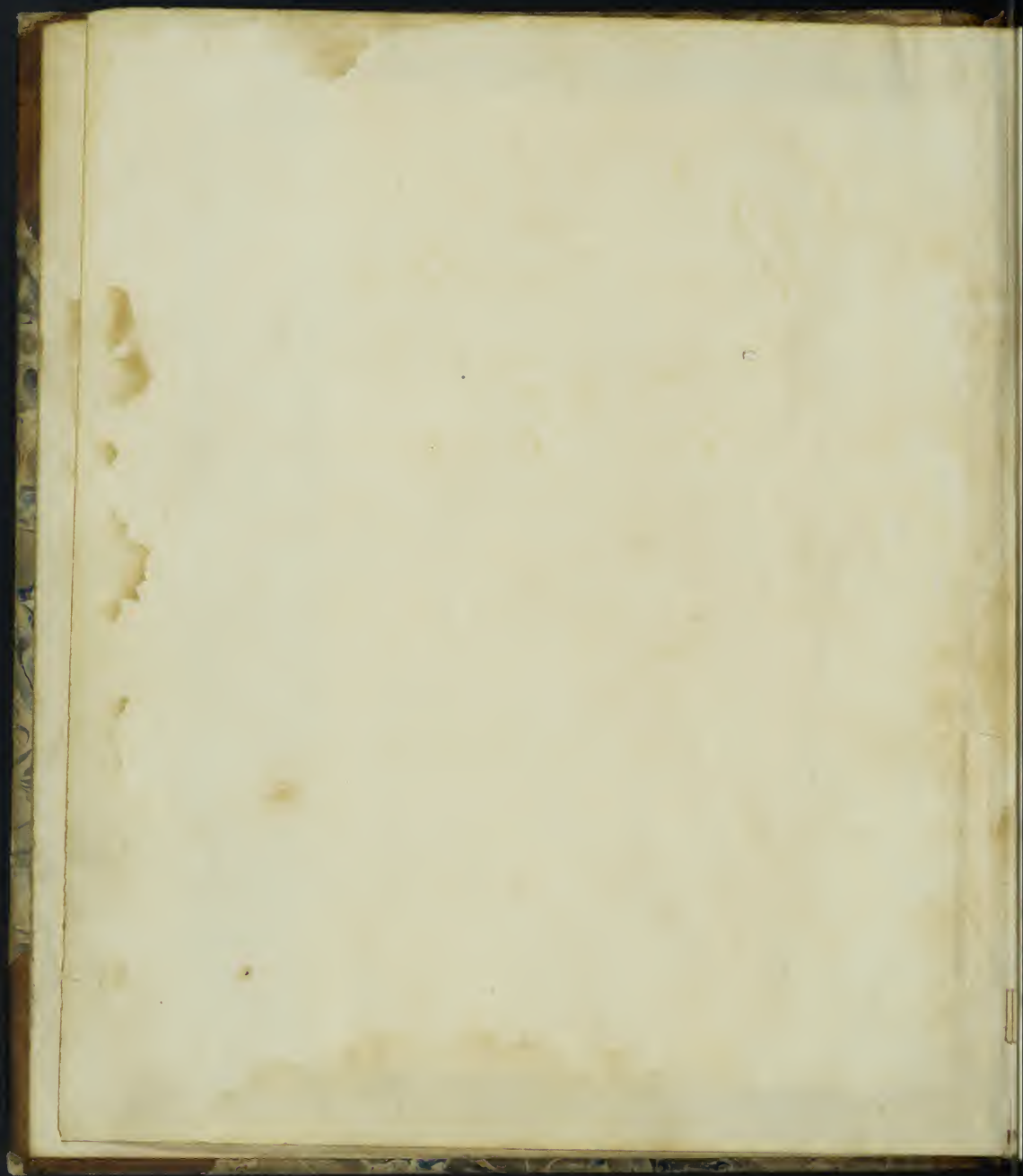


WILLIAM G. WILLIAMS attended the Litchfield Law School in 1799, and practiced in Sharon and in New Hartford. He died in New Hartford in 1838.

HIRAM GOODWIN was born in New Hartford in 1808 and attended the Litchfield Law School in 1828-29.

Apparently when a student of the Litchfield Law School, he copied the notes which William G. Williams had taken when he was attending the lectures of Judge Tapping Reeve.

The note-books presented by Samuel A. Herman, the Coroner of Winsted, are these notes copied by Hiram Goodwin from those of William G. Williams.



Peeres Lectures.

Taken from Mrs. G. Williams

55.
Miram Goodwin.

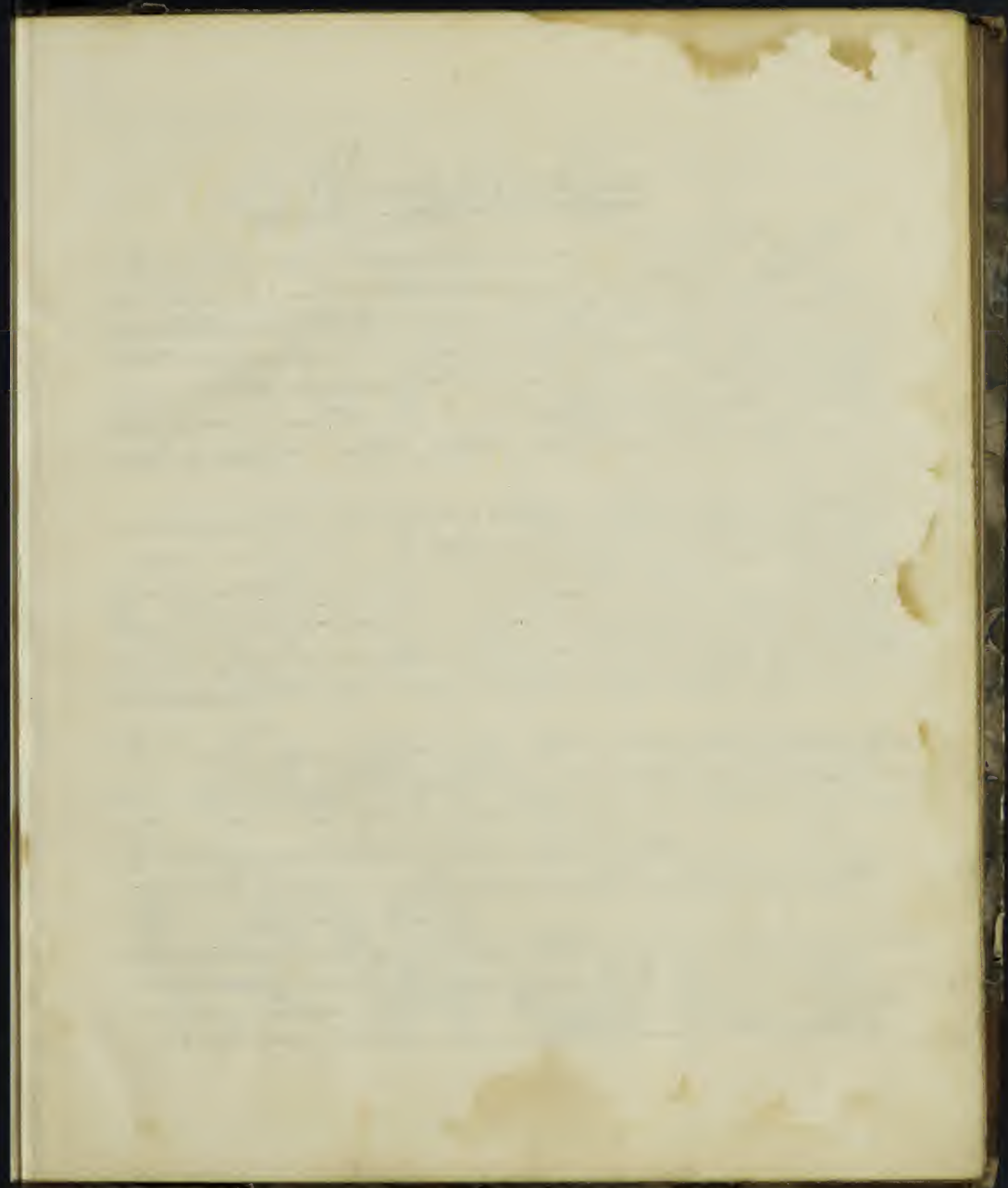
1828.

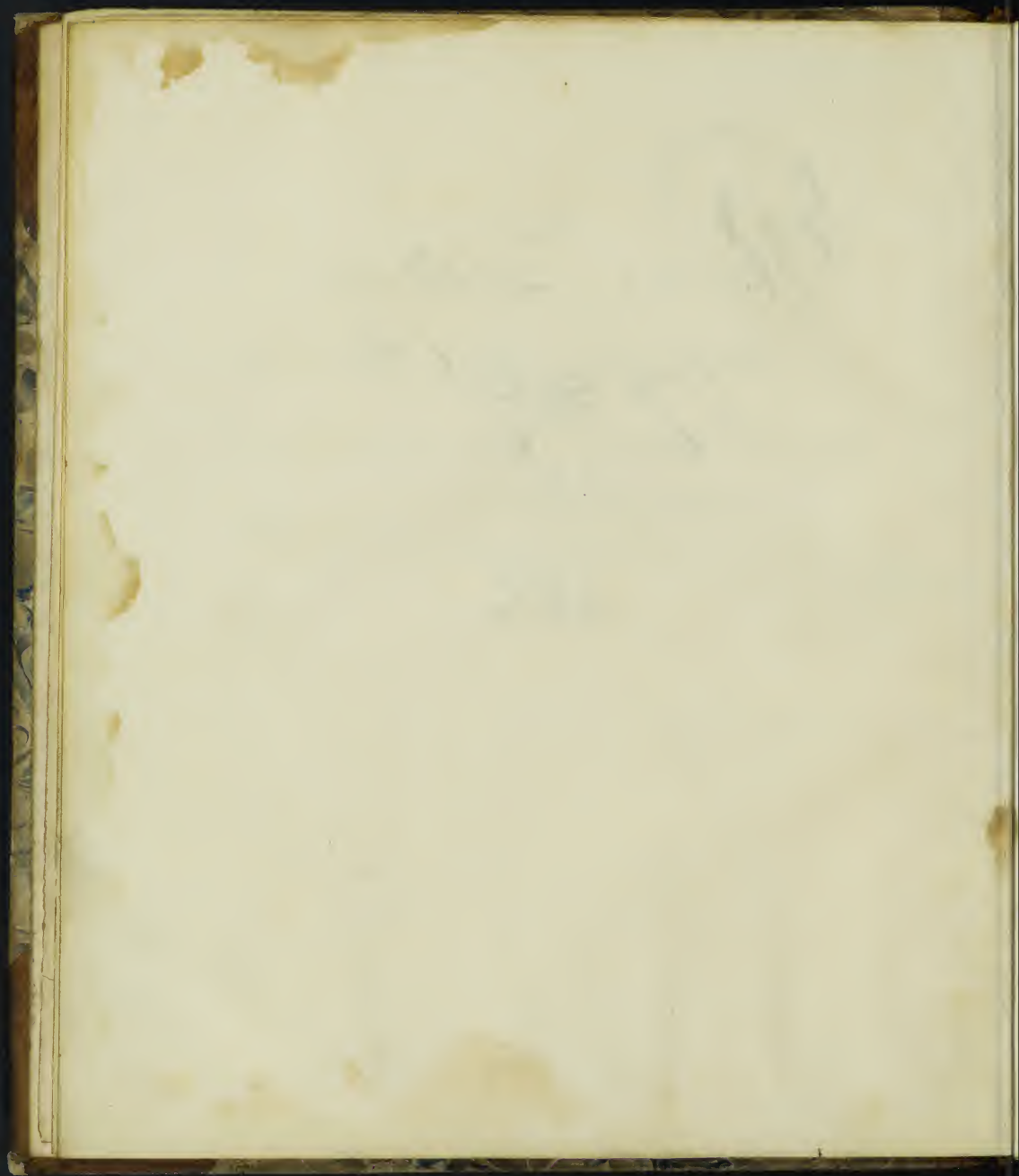
.LEX.

Three Letters

Handwritten text, possibly a list or index, including the word "Letters" and some numbers.

LXX.





Municipal Law.

Municipal Law, is a rule of civil conduct prescribed by the sovereign power in a state commanding what is right & prohibiting what is wrong. It is essential to municipal law that it be uniform & universal in its operation. It must not be understood however that municipal law can't be local, so that it be generally within the local limits of its operation, yet it may be confined within certain local bounds. 1 Bl. 38. 44.

A law is a rule of conduct, & therefore differs from a contract or agreement which requires the assent of the parties bound before they can be governed by it. It is a part to the definition of the municipal law that it be prescribed, it is therefore necessary that a law be published & known before it becomes binding on individuals; An ex post facto law is one yett punishable void. 1 Bl. 46.

Every individual who also have the means of knowledge before he ought to be affected by the law. But it is no excuse for any one, that he has not known the means. In every act of parliament, is to commence its operations from the first day of the session in which it is enacted, unless some other time is specified in the act.

But in some it is the general opinion that no new law is to commence its operation until the assembly is closed. The representatives returned home, & had time to acquaint their constituents with the laws which have been passed during the session.

2. Law must be prescribed by the sovereign power of the State, 1146-7.
 The ordinary words of a law are to be taken in their most known & usual acceptation; but when terms of art are used, they are to be understood according to the sense in which they are used by the learned writers or learned in that art 486 647. 6 Nov 153. 136 57-60.

But if the words of a Statute notwithstanding these rules, are still dubious & uncertain they are to be compared with the context & for this purpose the preamble is to be read in to aid the construction, for by their use in another part of the Statute may sometimes be determined the same in which they were intended to be used in that part which appears uncertain. 3 P Wms 195: Put 485: 146 365.

Another rule in the construction or interpretation of a L. is that the subject matter is to be taken in to consideration.

The effects & consequences of a L. are to be regarded 1136 61.

But the last & most important general rule laid down with regard to the interpretation of a L. is that the reason & spirit of the L. are to be consulted. This is what is called the equitable construction of a Statute or rule of L. Equity is the correction of what wherein the L. by reason of its unreasonableness is different. 1136 61.

Municipal L. is divided into the *Lex Scripta* & *Lex non Scripta*.

The *Lex non Scripta* or unwritten L. includes, 1st the C. L. so called 2^d particular customs, & 3^d certain particular rules which obtain in particular Cts. 136-63-7.

It is called unwritten L. because it depends ^{not} on particular Statute or written documents for its existence, but on immemorial usage.

By immemorial usage is meant a custom or usage with
 contents back beyond the time of legal memory - this time
 of legal memory is fixed in England to the time of the accession of Rich.
 1. 1381. 2 Nov 209.

3

But the task of still less authority, would have they cite
decided cases, for a judicial decision is always of higher
authority, than the opinions of any one writer. The writings
of ancient & modern authors are however considered as an
authority & some of the modern ones, particularly Pl.

2 in this state panel is generally considered as an authority - tho not in Eng. All these however are not 2. but merely evidence of the 2 - there is a state of itself 2. & can't be written. 1847.

Decisions upon any point in L are rather precedents of
these precedents are contrary to known principles of L
they are said not to be L - for a principle is that L which
can't be changed with the omniscience of the Legislature.
Therefore a precedent opposed principle is op-^{er}at to L.
A precedent is presumptive evidence of the L & to rebellion
unless shown to be flatly is or about. 1 Bl 40-1.
By the L of Eng^d is meant a custom extending over the
whole realm of Eng. 1 Bl 67. 79.

In point of fact Obs of justice make L. tho not theoreti-
cally speaking. The rules of pleas & pleadings are a part
of the C.L. tho they were wholly formed by Obs of L.
such also is the L relating to executory devises & future
pharmacies. & so is the customs of merchants.

Tho the C.L. is not enacted by the sovereign authority
yet it is established with its tacit consent. & therefore
it may be said to be prescribed by the sovereign author-
-ity.

Particular customs are local usages. they are L with
in the local limits of the place where they obtain. 2 Blk 285.

The existence of a particular custom is to be tried always by a jury unless the question has been once tried & recorded in one of the courts of the ~~the~~ Hall & then it becomes indisputable. It is a general rule that particular customs are to be specially pleaded, or the court will not take notice of them: an exception however in the case of the customs of gill kind & Borough English. See 265 Co Lit 175. 1 Blue 76.

The law Merchant is classed by Blackstone & other writers among customs but this appears not be correct, for the law Merchant is not a local usage, (which is the very definition of a custom) but it extends ⁴ over the whole State & is not to be pleaded or proved. See 125. 4 Burr 208 & Burr 1218-26. 5 Blue 436. 15675. 2. 450. 465-7 -

It is necessary that every custom to be valid should be legal & to make a legal custom certain requisites are necessary
1 It must have been immemorial Co Lit 110.

2 It must have been continued, any interruption therefore will destroy it, if it an interruption of the right, but a mere interruption of the possession merely does not destroy it 1 Blue 767 -

3 It must have been peaceably acquired in. Co Lit 114

4 It must have been not unreasonable 5 It must be certain 6 It must be compulsory 7 Customs must be consistent with each other.

4 Co 58. Customs which are derogation of the common law are to be construed strictly, & in Eng customs are always to yield to the superior rights of the crown. 1 Blue 78-9.

Particular Laws which obtain in certain jurisdiction are apart of the unwritten law, tho they are ^{not} a part of the common law
1.5.166 67.79

These in Eng are the rules of the civil & canon laws, adopted by certain Acts. They are not binding in Eng as civil or imperial law. but their authority is wholly derived from their adoption by the Act of Eng whence they become a part of the unwritten law 1.5.166 79.80. On the same ground is the common law of ancient statutes of Eng binding in Con. The common law of Deny is to ~~adopted~~ here, when it is not unreasonable, absurd, unjust or inapplicable, & that shown by the party who would have it rejected. It is the opinion of some that there can be no common law in Con for it is essential to the existence of the common law, that it has existed previous to the accession of Rich 1. to the throne of Eng or before the time of legal memory, which was long before the settlement of this country, but that rule of law that the time of legal memory extends back to the accession of Rich 1. if it obtains in Eng, (which is questioned by Blackstone) is perfectly inapplicable here, and therefore according to the rule above, is to be rejected.

The time of legal memory in Eng was founded on a writ of right which by stat was limited to the reign of Rich 1 but at common law the time of legal memory had no definite limitation, it was said to be the time beyond the memory

any man living, or time out of mind, & when any thing
 was said to have existed time out of mind, it was understood:
 that no man living had any knowledge to the contrary?
 See 170 Co. Lit. 115. 6. Quere. Is not this the law in Conn at
 the present day? But that a common law is indispensably
 necessary to the existence of society an irrefragable argument
 in my mind that we have a common law: for the most sim-
 ple right could not be enforced without it -

Common law I consider as a complete system of rights
 as applied duties & perfect obligation. Therefore whenever men
 come into a state of society they bring with them a common
 law -

Lex Scripta.

The lex scripta is no other than the stat. law. These statutes are
 not like the writings of the unwritten law, mere evidence of the law
 but they are law themselves. Ante Stat. of N York not admitted in
 evidence & lost 250, 300. The ancient English statutes were as binding
 here as the common law of Eng. but the modern ones are not.
 Like ancient English Stat. which are said to be binding here
 extend as far down as the middle of the reign of Hen 8. The Eng
 consider their Stat. ancient, as binding on their colonies as
 they are in Eng. for when the members of a colony emigrate from
 the another country, they are said to carry with them the laws which
 then existed in the mother country as their birthright
 1 Bla 108. 2d. 411. 666. Sanders, 82. 102. 360.

Statutes are divided into public & private, or general & special. A public Stat is one which regards the whole community, & a private Stat one which regards individuals only. 1 Bla 46. 5. 2 Co 438. 10 Co 101. They are bound to take notice of public Stat as officers, but they cannot take notice of private Stat unless they are specially shown. 4 Co 76. 1 Bla 46. A Stat relating to all mechanics of a particular profession is a private Stat, but one relating to mechanics of every denomination is a public Stat. So a Stat relating to all constables is a private Stat, but relating to all officers is a public Stat. So also in Eng a Stat relating to all Bishops is private Stat, but one relating to all ecclesiastics is a public Statute.

When a Stat regards a genus which consists of distinct species it is a public Statute, but when it relates only to a species which is of individuals only it is a private Stat. 4 Co 76. 19 in 496. 4. 2 Sand. 145. 1 Leo 46. 1 P. Ray. 120. 1 Co 106.

There is an exception to the latter part of this rule where a penalty is annexed which goes to the crown 4 Co 77. 4 Bar 640. Skin. 429.

A Stat relating to the revenue is a public Stat 10 Co 57. Mon 67. 11 Mod 249. 613. In Eng a private Stat must be pleaded. 14 in 498. 1 Bar 58. 4 Co 76. 10 Co 57. 2 Mod 57. 2 Rol. 466.

But in Con it may be given in evidence under the general issue.

In Eng a public Stat, when pleaded need not be recited, but a private Stat must be recited 4 Bar 655. 4 Co 76. 10 Co 57.

But in Eng if a public Stat be recited a mis recital is fatal & disallowed by verdict. Cro El. 236. 245. 4 Bar 658-9. 19 in 508. Doug 93-

If a private stat be misrecited the variance must be shown on the record: & if it be neither shown on record nor in evidence a verdict will cure it. 1 Bos 386 2 Bay 342. 2 Ald 441. 4 Bos 654-9.

But tho in Con a Deft need not plead a private stat, yet he must show it in evidence & it will go to the jury as a private document.

Both in Eng & Con when an action is brought upon a private stat the ^{Def} must set it fairly in his declaration.

Another exception to the general rule in Eng. that a public stat need not be pleaded is when a public stat is intended to defeat a specialty, for in this case wtho the stat declares the contract to be void, as the stat of usury, it must be pleaded. 5 Co 119 a 54. 611. Hol 72. 3 Sal 391.

It is laid down generally that a stat which speaks in the affirmative does not abrogate the common law, this rule, however must be taken with this restriction, that the stat do not imply a negative, & then it might as well be express by saying that if a stat express or impliedly takes away the common law it is abrogated 1 Bla 34.

It is a general rule that if the stat gives a lower remedy than the common law the common law is abrogated. But where the stat gives a higher remedy than the common law it is accumulative, & the common law remedy is not taken away 2 Com 226. 2 Knt 49. 19 Hen 511. 4 Com 341. 60 Lit. 14-15. 4 Bos 641.

7 When the stat is inconsistent with the common law the latter must give place to the former. It is said that an affirmative stat does not repeal a prior affirmative stat if there was no common law provision upon the same subject. *Quia* if there was. 2 Show 30 Co 80. 104. 60 19. C — 20 Ric. 146. 11. Co. 61. a. —

10- This rule is not very important for the true criterion is the ^{intention} of the Legislature; indeed the rule seems to be extended only to discover the intention of the Legislature. If their intention appears to have been to repeal a prior Stat or to abrogate the common law it will soon be considered. 4 Dierpf. 3. 4 Bac 647-4. Blon. 232. 116. 73.

It is common for stat^s which invalidate contracts to declare such contracts to be void. The word void is perhaps more indefinitely used than any other word in the law, a thing which is to all intents and purposes void is as if it had never existed, it is a mere non entity; but a voidable contract creates a continuing obligation until it be regularly set aside. Of a thing void any person may take advantage, even in a collateral way; but of a thing voidable only no one can take advantage except the person against whom it is made voidable, & that in a regular manner. When a stat declares a thing void without any words superadded it is generally construed to voidable only. But if there are other words superadded, indicative of an intention to render the thing absolutely void, as by declaring it void to all intents and purposes it is generally construed void. To this rule however there are exceptions, for if the object of the Stat can be attained by construing the word void to mean voidable only it will be so construed, although the words to all intents and purposes be superadded. But if the object of the Stat cannot be attained by such a construction, it will be construed void. 5 Co. 590. 60 n. Cro. D. 191. 117. 1. Bla 87. 2 Dierpf. 606. 11 Co. 59 a. The it is necessary to recite a private Stat in declaring upon it, yet it need not recite rehabilitate. it is sufficient to recite the substance, unless it be recited in pro rehab - &

then it must recite revelation, 4 Co 76. 1. Col 466. 2 Mo 57.
But the title of a stat need never be recited, 3 Co 33. 10 Ky 77. 1 Com 230
4 Bac 655-8 -

But tho it is unnecessary to recite the title yet a misrecital is
fatal, 6 Ma 62. Or 9236, 4 Bac 654 10 Ky 77. And 524.

No declarations of private stat. need be recd is a good plea, but in
offence where the action is tried on a public stat. 8 Co 28, Or ca, 355.

There are stats which are partly public & partly private. in these cases
it is necessary to recite the private only. 10 Co 57. 7 Hob 227.

It is laid down that in declaring on public stats. there is no
need of counting upon them. Carth 382-3. 194 in 503 -

But to this rule there are many exceptions, for if there is a common law remedy
co-existing. the stat must be counted upon or it will be presumed that the
common law remedy is accepted. 1 Com 230. 194 in 504. Lelu. 544

When a public stat prohibits an act. or enjoins a duty without pointing out
a remedy there is no necessity of counting upon the stat. Somewhere the stat awards
an old remedy to a new case. Carth 382. 194 in 525-4. 4 Bac 656. 1 Com 230 -

But when a public stat is penal. whether it inflicts or punishes or gives more
than single damages. it is necessary to count upon it. 2 Blou 556. 3 Blou. 206. 1 Bac 39. 194 in 50.
If one stat prohibits an act. and another inflicts a penalty for the commission of that act
it is necessary to count on both. 1 Blou 206. 194 in 505.

If a stat gives a new action. in
declaring it is necessary to count upon the stat. 4 Bac 656. 194 in 504. If a contract
of any kind which is good at common law with out writing be required by the stat. to be
in writing it is not necessary in declaring upon it to aver it to be in writing; But
if a stat make writing necessary to a contract unknown at common law it must
be shown to be in writing. in declaring on that contract 12 Ma 540. 4 Bac 655-6 -

So when writing is required at common law, it must be shown to be in writing. In Eng the recital of a stat must contain the date of the stat & the place wherein it was enacted. 1 Com 231, 4 Bac 657. Oro. Ja 21. 2 Co Ca 236. 2 Han 246. But this is not necessary in Con. All exceptions in the enacting clause (or in a preceding clause, to which the enacting clause expressly refers) of a stat inflicting a penalty must be negatived in a declaration on the stat, to recover the penalty. 7 Term Rep. 27. 2 Wm Bl. 214. 6 Term Rep 589. 1 Wm Bl. 666.

A verdict will not cure the omission. But if the exceptions be not in the enacting clause they need not be negatived. 1 Com 225; 1 Leo 26. 1 Durf 191. 2 Kay 455. 120. How 410. When the stat & the common law offer different remedies either may be pursued. 2 Bur. 779. 803. 5 Con 698. And in such case if the Plff brings his suit upon the stat & fails he may in the same suit recover at common law if he can bring his case within the common law remedy. 2 Keb 138. 2 Bla Rep 400. Sal. 212. 2 Han. 191. 502. 346. Moor 789 formerly folded at the side. 5 Co 99. Co 8. 231.

When a temporary stat is continued by a subsequent stat, it is always sufficient to recite the first stat. 4 Bac 686. 1066. When there are several stats respecting one thing, they are all to be considered as but one stat. Therefore in construing one must look to all. 4 Bac 646. How 206. 2 Kay 1028. It is laid down that if an act be decided an offence by stat, which was no offence at common law & a particular mode of prosecuting, is pointed out by the stat, no other mode can be pursued. 2 Bur 803. 5-54. Sal 45. Oro 524. 688. Oro Ja 644. 4 Bac 646. This rule however must be taken with this qualification, that the mode of prosecuting prescribed, be in the enacting or prohibitory clause for if it be in a distinct & separate clause, the performance may be by a common law mode. 1 Bur 845. 4 Geo 2 105. 2 Han 802. in note.

If the act was punishable at common law the stat. remedy is accumulative & the prosecution may be either on the stat or at common law. 1 Burr 799, 803. 4 Duff. 202. If a new offence be created by stat & no mode of punishment is prescribed, it is punished as a misdemeanor at common law. 19 Lin 512, 518. Cro El 655. 1 Burr 545. It is that statute contrary to reason or the law of God are not binding 8 Co 114. Hob 47, 9.

This rule however appears to me to be indefinite; for this would be settling the judicial above the legislative authority, and gives etc of law the power of setting aside every law which should appear to them impolitic, for every law which is contrary to good policy is contrary to reason & therefore unreasonable. If the stat appear to be absurd, unjust or unreasonable or contrary to the law of God, it is the duty of Cts to find out if possible a construction which will make it reasonable. 1 Bla 91, 110, 23.

Where there are any absurd or unjust consequences, which are collateral to the act, & which were unforeseen by the Legislature, the stat. so far as it respects such collateral consequences is void. 1 Bla 91.

It has been much questioned whether a Ct has right to declare a stat. unconstitutional & void. It seems however that it has, for the constitution is a law by which the Cts are to be governed, & are paramount to all others, therefore if a law be opposed to the constitution, the former must give place to the latter, & this principle is recognised in the federal Cts, for in all prosecution before them on the acts of the United States they have sustained the constitutionality of the law to be impeached.

The time for a stat to commence its operation in Eng. is the first day after the session in parliament in which the stat was passed unless some other time be specified. 4 Co 114. 3 Cr 111. 2 Kay 371. 19 Lin 445; 2. Vol 460.

over all others, is that penal statute as well as all others, should be¹⁵
construed according to the intent of the Legislature & Judges;

In some instances the Engts have deviated from the rule of construing penal
statute strictly. How 41. Co 71. It is a rule in Eng that if a stat makes a new law
concerning an old offence & appoints certain particular Judges to hear &
determine the offence, the jurisdiction of the Ct of Kings Bench is not
thence taken away. So a stat provides that certain offences shall be tried in
particular Ct. the Ct of Kings Bench has concurrent jurisdiction for that
Ct is never to be ousted of its jurisd by mere implication. 1 Har & W 119. 9 Co
118. Sal 519. 2 Bos 1042. 1 Wils 452. But if a stat creates a new offence & estate
lib a new jurisdiction to try the offence & points out a particular mode of
proceeding, it is a question yet unsettled whether the Ct of Kings Bench has jurisd.
1 Har & W 119. 2 Bos 1042. 1440. 2 Bos 1042. The intention of the Legislature
however in such cases is always to govern, & this rule is only an in-
depth that intention. It is a general rule that remedial statute are to
be construed liberally. By this is meant that cases not within the
stat may be construed to be within the reason & spirit of it. 4 Bos
681, 3 Inst 381. 6. Co 123. 3 Co 7. 11 Co 71. How 365. 465.

A consequence of this liberal or equitable construction of the
stat is that the letter of the stat is sometimes enlarged & sometimes
restrained. When a stat is both penal & remedial it is to be constr-
ued strictly when the public is prosecuted & liberally when the
individual injured is prosecuted. Such statute are both penal &
remedial & therefore are to be construed according to the rule above.
i.e. it is not to be strictly construed when it acts upon the offender in-
but liberal when it acts upon the offence. How 365. 9 Co 115.
1 Bos 188, 3 Co 82.

16 It is a general rule that if a stat inflicts an additional punishment on
12 the second commission of an offence the offender must be convicted
on the first commission, before a conviction for the second, or he will
not be liable to the accumulated punishment. (the offences must
be of the same kind. Root 163.) So the first conviction must
precede the repetition or the second commission of the crime
1 Inst 468, 1 Haro 168, 322, 1 Hale 349, 144 alibi 324, 371, 685; 13639
2 Root 150. The rule of construing stats is the same in a ct of Eq^{ty}
as in in law, the construction being the investigation of the in-
tention of the legislature 1 Brown 240, 256 430. It is a general rule of
common law, that the penal laws of one country cannot affect
the rights of citizens in another. But this does not extend to
remedial laws, 3 Dougl 732, dicting universality of express-
9 sion with respect to persons expressly used in a stat. does not
include persons who were exempt from the operation
of a similar law before existing 19 Min 801. 6 Cow 468;
The rule with respect to infants when the stat relates to a public
offence, is that they are to be included in such general ex-
pression, unless a corporal punishment is inflicted. 1 Phil 1
If a stat enables all persons to dispose of their property in a particu-
lar way it does not include those who could not ^{dispose} of
of their property any other way before. 10 Dougl 141, 122 500 222 369.
When a stat merely ~~relates~~ creates a public offence without point-
ing out the mode of prosecution it is to be prosecuted only by the
public 15 Me 37. 2 Haro 265. In Eng private persons are permitted
to prosecute public offences, at least such as do not amount
to felony.

The person prosecuting is called the prosecutor through the whole of proceedings, & is entitled to the cost; but the prosecution is in the name of the public. If a stat prohibits, or commands a thing for the benefit of an individual: he has his private remedy on the stat. tho none be in express terms declared. 11 Ann 244. 30. 6 Mar 27. So also tho the stat do not prohibit or command a thing for the benefit of an individual; if he is injured by its violation, he may have an action upon it & give the stat in evidence 2 Inst. 55. 74. 10 Co. 75. 2. 4 Bac 653.

It is laid down by Mr Hale that in a private action he lieth for an act which is a violation of a public law, on the Deft being found guilty the public punishment may be inflicted, & this is usually done on motion of the Plt. When a stat inflicts a penalty or forfeiture upon any one who shall dispose of his right: the penalty or forfeiture on conviction goes to the individual injured. 3 Lev 290. 10 Mod 159. Whenever a penalty is inflicted by stat. & no mode of recovery is pointed out the action of Debt is the proper mode to recover it 1 Rep 175. 4 Bac 653.

Qui Tam Prosec^{ns}

A qui tam prosecution is one which is brought by an individual in his own name, in the name of the public. it is a mixed prosecution known at the common law, partaking of the nature of both a civil and a criminal prosecution. Considered as a criminal prosecution it has been decided in Con not to be appealable from the County Court. If the Plt in a qui tam action withdraws in Ct the public prosecutor may enter & ~~proceed~~ pursue the same prosecution, or bring forward a new prosecution in the name of the public. 3 Blue 162

If for an offence immediately injurious to the public only there is a sum certain given to any individual who will prosecute the offence & also a fine or penalty to the public. *qui tam* lies. I am here the offence. is immediately injurious to the ^{public} only. A fine only is imposed part of which is given to the prosecutor, *qui tam* lies 24 Am 465:337. 2 per 95. 1 Com 227. 2 Com 513. 4 Co 15. 1 Bac 37. If a stat expressly allots a penalty to the party injured, he may bring an action in his own name only & need not bring a *qui tam* 1 Com 441. If a stat prohibits an act which immediately injures to an individual, he may bring a *qui tam* action. altho no penalty or damages be ^{expressly} given him, 1 Com 228. 4 Co 15. 1 Bac. 37. 2 Haw 377.

The conviction of an offender on a *qui tam* ~~process~~ action is a bar to a public prosecution for the same crime. A conviction on a public prosecution is a bar to a *qui tam*, 1 Com 229. Bac. 41. 3 Bla 162. When a person who has a right to prosecute a *qui tam*. has once commenced it he acquires an interest in the penalty, which cannot be taken from him by a subsequent prosecution; but the prosecutor may remit his share of the penalty 2 Haw 286. 1 Bac 42.

So when a *qui tam* is commenced the public tho it may remit its own share of the penalty, cannot defeat the right or interest of the prosecutor, 2 Haw 275. 1 Com 229. CroE. 138. 583. 11 Co 656. — The distinction in common acceptance, between a penalty & a forfeiture is. that the first is pecuniary imposition which goes to the public 48 Br 654. the latter a pecuniary imposition which goes to the public, 45 Br 653. 4. The distinction between a penalty & a forfeiture I apprehend to be this. that a penalty is a pecuniary imposition of a sum certain. whether it go to the public or to an individual.

A forfeiture is an imposition or loss of the whole or certain part of the whole of the offenders property or goods. According to the first distinction, it is held that if several are convicted on a popular stat in an action but for the penalty, a single penalty is only to be inflicted on the whole. If the offense be in its nature several then each are liable to the penalty. *Cor. 610. 5 Mod. 488.* but if on a conviction of several which subjects the offender to a forfeiture each separately incurs the whole forfeiture. It is said that a penalty is a satisfaction to the individual injured but a forfeiture a public punishment. we find however that penalties do not always go to the individual injured. *1 Moor 483, 014 60. 608 486 2 Durnf 712, Dal 184. 2 Durnf 409.* When one prosecutes on a popular stat to recover the penalty, he recovers no cost unless the stat expressly gives it to him. But when the prosecution is by the party injured he recovers his cost tho none be allotted him by stat, for he recovers in the name of damages, & tho no costs ^{now} ~~are~~ allowed at common law, yet the stat of Gloucester gives cost when the party recovers damages. *1 Hol 574. 2 Haw 274. 13 ac 511. 14. 2 Kel. 791.*

It is a general rule that a stat cannot have a retrospective operation, therefore if an offence be committed under an existing law, & before the prosecution (or so should apprehend before the conviction) that law is repealed or another made, the offender cannot be punished at all. *1 Haw 169.* tho it is a general rule that a stat cannot have a retrospective operation yet there are some exceptions in the case of statutes relating to contracts, for if an obligation be entered into or afterwards ^{1.5} a stat is passed rendering such contracts unlawful.

41 the contract is repealed. 2 Sal 198. Dye 27. 8 Ma 51. 379. 2 Sthms 218, 1 Toulb
111 D'ray 1358. But, since the constitution declares that no law shall
be made impairing the obligations of contracts, no stat could have
such a retrospective operation in this country. So according to the
common law if one should covenant not to do an act & a law should
be made requiring the commission of that act, the covenant is
thereby repealed. Sal 198. But a covenant not to an unlawful
act, is not repealed by stat making that act lawful. 18 Cui.

Where the contract is executory, & the stat renders it void in part
only, but to a certain extent, it is still lawful. The such contra-
ct cannot be enforced in a Ct of law. Why will compel a performan-
ce so far as it is not unlawful. 17 Toulb 911. 3450 PC 384.

Where there are two stat repugnant to each other, the latter repeals
the former, but if a repealing stat is itself repealed, the prior stat
is thereby revived 4 Inst 325. 1 Blue 96. If there are three repealing
stat & one of them are repealed, the prior repealed stat, is not
thereby set up. 2 Inst 686. 4 Bac 638. If a stat be repealed, all
acts done under it before it was repealed are good: but it is said
if a stat be declared null, all acts under it are void. 10 Ark 233.

4 Bac 638. If a stat be repealed all act

This rule however is opposed to every just principle; for if all acts
done under a stat afterwards declared null are void no member
of community could be safe, for while he is acting under the
most wholesome laws of society, he is in danger of being punished
for those acts which he was compelled by law to perform. if a whim-
sical & capricious legislature should take it into their heads
to

to declare the stat null and void; as did the Legislature of Georgia. 1
A prior Legislature has as much authority to make binding laws, as
a subsequent one: & a prior Legislature can make no law derogating to
the power of a subsequent one, which will be binding on them. So
it would seem, a subsequent Legislature cannot take from a prior
one its proper authority. But every stat is in its nature repealable. 16

4 Inst 43. When stats are repugnant to each other, the former must
give place to the latter. 6 Mod 287. If the latter part of a stat be repugnant
to a former, ~~stat~~ part, the former part is far repealed as the latter is
inconsistent with the former. & if it be totally inconsistent, the whole
of the former part is repealed. 11 Co 63. 10 Mod 118. 1 Rol Rep 87.

But if there be a saving totally repugnant to the body of the act, the
saving is void, otherwise if it be only in part repugnant. 1 Co 47. 15 Jac 87.

If a stat enables a body of men to do an act by majority & establishes
a certain number a quorum, a majority of that number
cannot bind the whole unless the stat expressly gives them that
authority, but it must be done by a majority of the whole. 4 Burr 642. 3 Mod 113. 1 Rol 83. 11 Co 30. Hol 211. When a corporation
is created by stat, a majority of ~~its~~ its members have always a
power of binding the whole. Perry 594. 4 St. & 10. 22.

The construction of stats is always the province of the Judges
Hol 346. Plow 109. 3 Co 7. 22 L 11. 42

When in the Common law & the Law Merchant differ.
 It is a general rule of common law that fraud in the consideration of a contract, does vitiate the contract, but only the party defrauded is to a recovery in damages. 3 Co. 1. 1 Bur 345. 5 Cr 2634.
 But it is other wise by the law merchant, even in negotiable instruments, as between the immediate parties. Our L^{ts} have in all contracts adopted the law merchant, when there is total fraud in the consideration; but then be but a partial fraud. The remedy is at common law. By the common law if one of two joint obligors be taken in execution & discharged, with the consent of the obligee, his co-obligor is also discharged. But one of two joint promisors be taken in ex^{ecution} & discharged by the creditor, the other is not thereby discharged, by the law merchant, so in a bill of exchange - 2 Blac Rep 1235 -
 So by the common a consideration is necessary to every contract, but it is other wise by the law merchant 3 Bur 1663.

By the law merchant if a man purchase goods, before they reach his hands, become insolvent, the seller may stop them in transitu & countervail the delivery, at any time before they come to the hands of the purchaser; unless there has been a sale of the goods, or assignment of the bill of lading by the purchaser, then it is other wise by the common law. 3 Durnf. 119, 466, 14th 248, 4 Bur 1057, 2 Durnf. 63, 674, 2 Blac, 504

It is general rule at common law that no person on the ground of contract, can be made an involuntary debtor, to another secus, by the law merchant.

In the law merchant parol testimony is more readily admitted²³ to control a written agreement, it being a rule general at common law, that parol testimony shall not be admitted, to vary, control, or contradict written testimony, but under the law merchant written agreements are frequent-ly controlled by parol testimony. A policy in insurance has been allowed to be controlled by parol testimony. Bul 449.

Articles of Cont.

Acts regulating civil Actions

In eng. property is not attachable for debt. the only process which they have to secure a debt is by attachment against the body of the debtor. But by that Con. property may be attached without meddling with the body & that property when attached is holden for the debt. If the debtor has sufficient personal property which he offers to turn out to the officer, his body cannot be arrested either on mesne or final process. As to the Cred. may lay his attachment on real property. It will be holden to respond the juryment. But the debtor cannot prevent his body by turning out real property for the Cred. has his election. If general directions be given to the officer to take property and none being turned out to him, he arrests the body when the debtor evidently had personal property sufficient. tho the debtor can not complain, yet if a loss thereby be occasioned to the Cred. the officer is liable. But if there was any reasonable ground for the officer to suspect, that the debtor had parted with the property, whether by a good or fraudulent sale he will be excused. In eng. after the creditor has obtained judgment he may take out execution against the property of the debtor or a car. pa. against the body only at his election. But in Con. if the debtor if the debtor will turn out personal property his body cannot be taken, tho the body has been taken. if the debtor turn out personal property, his body must be released vide Root 120.4 But where the debtor was arrested & he refused to turn out property, but after the officer had carried him, jail and was about committing him he repented and offered to turn out property,

if the officer would go back with him 20 miles to his home, which the officer refused. It was held that the officer was justified. The officer cannot take property for part of the execution & the body for the residue, for the body is supposed to be ample security for the whole debt. The creditor is not obliged to lay his execution on the property which he attached, but he may lay it upon any other property which he can find. When the officer lays upon personal property he may deliver it to some person to keep & take his receipt to deliver at the port. If he do not deliver it, there is no compulsory process to compel him, but the officer must sue him on the receipt & need not allege that the execution is unsatisfied. *Roll 92* holds that the goods were forfeited *Roll 140*. If the execution had been otherwise satisfied the receiptman is liable to the officer. *Roll 374*, & the creditor has his remedy against the sheriff. The officer is not obliged to take a receipt & if he has good reason to believe that the property is not intended to be delivered by the receiptman, he would be perfectly justified in refusing it. In an action by the sheriff on such receipt there is no appeal, to remedy the inconvenience which might arise to the debtor by the sheriff refusing to accept the property the debtor may sue the sheriff on the goods attached on mesne process & execution. This statute obliges the authority granting the writ to take sufficient bonds, & it has been decided that the sheriff's bond is not such an one as the statute requires. Whether the bondsmen are liable for the whole judgment or only for the value of the property received is a question undetermined in Con.

Notes of Con

But though the bond is given to answer all damages & recover, yet, I apprehend he would be answerable for the value of the body only. If the body be taken on mere process, the plaintiff may suffer him to go at large, if he have him ready to charge in execution, even tho he has been actually committed. But in any, if he has been once committed the sheriff may not suffer him to go at large afterwards. If he be demanded in ex^e, within five days after the issuing of the writ, & the sheriff do not have him ready to be charged in ex^e when demanded, he will be liable. When the officer takes bail which is insufficient he is liable, but if it were apparently sufficient at the time, & the officer, acted bona fide, tho the bail turns out to be a bankrupt the officer will not be liable. The attaching ed may be guilty of a repudious lawsuit. If the cred take only enough to secure himself ^(see res can) & it is usual to attach double the amount of the claim, & if repudious he not the subject of the Writ, he will not be liable. & when the Writ attached lands to the value of \$5000, for a debt of one hundred it was held that the Writ was not liable to an action for repudious lawsuit as he could have been if he had attached personal property to that amount for it was not taken out of the possession of the owner, by attachment as personal property is. But I rather doubt the justice of this distinction since it might ~~was~~ be a great injury to the debtor in the sale of it. On paying out an attachment the Writ, must give sufficient bonds, which bonds were undoubtedly intended by the Legislature to be a security for all the damages which ensue to the adverse party in consequence of it, but the practice

has been, & the Ct has sanctioned that practice by a judicial decision, that the bond is only a security for the costs in suit -

When real estate is attached a copy of the attachment return must be left with the Town Clerk, on this part of the stat. it has been determined that altho no copy be left with the Town Clerk the service is good, & that this provision is only for the benefit of cred: & deb: and they only can take advantage of it. And although no copy be regularly attached attached the service may good upon the defend: to hold him to trial. yet altho the deft cannot object to the service in such a case, the plff may consider it a mere nullity if he pleases, & may take out another writ of attachment, & attach property, & the deft cannot plead the first writ in abatement of the second

Defamation Act.

By stat defamation is punishable as a public offence, therefore it is a crime for which a man may be bound for his good behaviour. To find out what is meant by defamation in the stat, recourse must be had to the common law, the same stat inflicts a greater punishment on those who defame magistrates in this manner, to the scandalum magnatum of the common law -

Act for the Distribution of Insolvent Estates.

This stat directs that debts due the state & for sickness &c shall be first paid. Ct of probate have construed this to mean last sickness debts only. contrary to the words of the stat & I apprehend, to the intention of the legislature, since it was intended to insure good treatment & attention to people in their sickness, & to prevent any unfair practice on them. But no judicial decision has ever been had upon the question

although the faculty have frequently complained of the decisions of the Ct of Probate. It is probable however that the Sup^{rt} would decide according to the established practice. Cred^rs not exhibiting their claims with in a certain time are to be barred, unless they can find other estate. Whether this part of the stat it has been determined, that if further estate be found, the Cred^rs who did not ~~will~~ exhibit their claims cannot sue on his original cause of action. By two Judges it was held that such Cred^rs ought to apply to the Ex^r or Ad^r to inventory the new discovered estate, & that it was the duty of such Ex^r or Ad^r to inventory the same. & to apply it first in giving such Cred^rs an equal dividend with the other Cred^rs & afterwards to apply the remainder equally in the payment of all the debts, & if there should be any thing remaining, to distribute it among the heirs - And this Supprehend is the regular method. But it was holden by the ^{other} Judge (there being then but three on the bench) that the Ex^r or Ad^r had discharged his trust, & therefore an Ad^r: de bonis non should be appointed who should as before. By the two Judges it was holden that if the Ex^r or Ad^r should refuse to inventory such estate & a suit might be brought upon the Ad^r bond in the name of the Judge of Probate & then the Judge would hold that judgment as recovery & he would distribute the estate among the Creditors.

The man who marries a wife acquires certain rights to her property. In her personal property in possession he acquires an absolute right by the marriage; in her choses in action, only a qualified right, if he reduces them to possession during coverture, they become his absolutely. The husband takes the wife, cum onere, i.e. becomes liable for all her debts, whether he receives any property with her or not. But he must be sued for them during her lifetime, for if she dies before any suit is commenced, the husband has all her personal property, & is discharged of her debts. But if he dies first, the wife again becomes liable for her debts, which were not paid or sued for during coverture, tho she cannot have her personal property again if the wife dies before the husband, her choses in action not reduced to possession, go to the representatives. If he dies first they survive to her. The chattles real of the wife, if the husband reduces them to possession, become his absolutely. But if he dies first, without reducing them to possession, they survive to the wife, if she dies first he has them absolutely. & the reason given is that by the marriage, he becomes joint tenant with the wife in her chattles real, until he reduces them to possession, & on her death is entitled to the whole by survivorship. As the doctrine of survivorship is not admitted in Con it would seem that the husband would not in such case, be entitled to her chattles real, but they would stand on the same ground as choses in action, The wife during coverture cannot sue alone for her choses in action, neither can the husband bring a suit upon them without the wife joining. Folles 170. & if judgment be obtained & he dies before collection, the wife will be entitled to the benefit of the judgment but if she dies, the husband will be entitled to the whole judgment.

Baron & Hume.

in Eng. by survivorship as in all cases of joint ~~tenancy~~ joint's where survivorship obtains. Whether the husband could be entitled in such a case in Con. doubtful. & I apprehend he would not, for his right is made absolute only by collection. In the real estate of the wife the husband acquires only the usufruct during coverture, or if he has a child by her, during his life as tenant by the curtesy. But he has no control over the fee, that must descend to the heir, unless devised by her, when she has the power of devising. The husband may dispose of the wife's chattels real & choses in action in his life time, yet he cannot devise them.

Co Lit 46, 351, 1000, 392. 3. Nov. 186,

The husband is entitled to be administrator to his wife, & as such by the stat 24 Car 2. is entitled to her choses in action, after her debts are paid. And though he refuse to take out administration, yet it seems he would by that stat. nevertheless be entitled to her choses in action. ^{5th 80.6.}
But as we have no such in Con. I apprehend he is no further entitled than any other adm^r. The husband may lease the real estate of the wife during his interest therein, & if attempts to convey it in fee or lease it for a longer term than he has power, it will be a good conveyance of his interest only: by the stat Hen 8. the husband & wife may lease her lands for 21. years, or three lives, after the termination of coverture. So by the same stat he is entitled to the rent in arrears at the time of her death, tho it is but a chose in action. No contract of the wife living with the husband, will bind her in Eng except a conveyance by fine: but by fine she may with her husband convey her lands & in Con she may with her husband convey them by deed.

If the wife convey without the husband & he does not interfere the conveyance will be good, but she cannot affect the husband's interest. As it is a maxim in Eng that no estate of free hold can be created to commence in futuro, she cannot convey her estate subject to his interest. There can be no objection however to such a conveyance in Con —

Of the wife's interest in her husband's property. On the death of the husband the wife is entitled to one third of his personal property, undivided, if he left children, & one moiety if he left no children. & this belongs to ^{her} absolutely, But he may devise all his personal property away from her except her Pamphernalia. Pamphernalia are the wife's necessary apparel, bedding, & ornaments of her person suitable to the rank & estate of her husband & these he cannot devise from her. 2 Atk 78. 217. 394. 388. Neither can he, during her life, dispose of her bedding & necessary apparel, nor have his creditors a right to meddle with them, but her ornaments & trinkets he may dispose of during his life, & if his personal property is insufficient to satisfy his Creditors they are liable to them 2 Atk 104. But all the personal property whether devised or undivided must be exhausted before those things can be taken for the payment of debts. & if a specially Creditor exhausts the personal fund, so that the wife's part must be taken to satisfy simple contract Creditors she will stand in the place of a specially Creditor, & have a lien upon the land to the amount of the personal property taken by the specially Creditor. 3 Atk 369. 438. It seems as if in Con the real as well as the personal property must all be applied before her part can be taken.

Baron & Hume

So if lands be devised to a trustee for the payment of debts if his part be taken by C.D. she may compel the trustee to reimburse her 3dtk 438.

If her part be ~~pledged~~ pledged by her husband she may redeem it after his death & if there is personal propy sufficient, she shall have the aid of that in redeeming it. 3dtk 542. As to ^{her} part the wife is always considered as a C.D. So the real of the husband, the wife on his death acquire an usufructuary right during her life of one third of all which he was seized of at all times during the coverture & of which any child which she might have had would have been heir.

This is the rule Eng. but in Con she is only donable of such real as the husband died seized of. A question has been made in Con whether a wife of the Don & her, should be endowed of the land which the wife of the father held in dower, it having been objected that that the husband must have died possessed as well as seized, & it was decided that she should, but that she must wait till the mother's death before she could enjoy it.

Of the husband's liability.

As to the wife's contracts before marriage It is sometimes said in the books that the husband is liable to the debts of his wife if recovered during coverture, sometimes it is said if sued during coverture he is liable, from whence it does not clearly appear if the suit be commenced during coverture & the wife die before judgment, he will then be liable.

The rule of Law, that when a man has attached to himself by common ^{law} a legal process, a right of recovery, that he shall not be defeated of that right, would seem to decide the question in favor of the ^{husband} ~~husband~~ But

But as the ground of the husband's liability is not that he has received the property of the wife, for if that were the case his Ex^r would be liable after his death; but that by the marriage the husband has taken from the wife the liability of being sued, this being the true ground, the principle of his liability would not be per se entire, if the suit were suffered to proceed against him. The ques. may be considered as a very doubtful one & perfectly unsettled. Suppose, however, whenever it comes to be settled, that legal principles will be found to warrant a recovery against the husband. The many ques. have undoubtedly arisen, yet no case is to be found in the Books, except where judgment was obtained in life of the wife.

11 Mod. 468, 11 Mod. 352, 5 Mod. 180, 2 Co. Cas. 208, Carth. 418, 1050.

2 For the torts of the wife, if the wife commits a tort either before or during coverture the husband is liable to be sued with her, & the damages will be recovered out of his estate; & if recovered during coverture, for those committed antecedent to the coverture, the remedy will survive against the wife; but if she commit a trespass in his company during the coverture, she is supposed to act under his coercion, & is excused from all liability. So if she commit a theft in company with him, the husband only is liable ~~at~~ punishable. Co. Lit. 133. The same rule as to the husband's liability applies when the wife is administratrix & is guilty of a misfeasance, as by committing a disseizin Co. Cas. 603. Tho' the husband is liable in tort for the torts of his wife, yet he is not punishable for her crimes, except where she commits theft in his company. 4 Co. 71, 11 Mod. 813, Co. Lit. 482.

It has been said that where the wife is punishable by fine, it shall be recovered from the husband's estate;

but as there is no process against him. I do not see how his estate can be taken to satisfy the fine, on this see Co l. l. It is true that when a feme covert incurs a stat penalty. the husband is liable; but the action to recover the penalty. is a civil suit in which the husband is joined with the wife / How 3 or 6: the wife cannot abate the goods of her husband. i. e. she cannot commit felony by taking them. animo furandi: for it is said they are but one person in law & the husband answers for all his movable goods, on the marriage which gave him an interest in them / How 94. or 141. This however, is not the true reason. it is that by the marriage he constituted her bailee, of all his goods. If a feme sole debt money pending the suit. it will go on against her. & it judgt be obtained against her. she may be taken & imprisoned without her husband.

Of the interest he has in her property acquired after marriage. If lands descend to the wife during coverture, he has the same interest 27 in them, which he has in her other lands, & he cannot prevent her from taking them. But it is said if the lands be devised to the wife. he may by his dissent prevent her from taking them. for the husband may void her purchase by his dissent. & this is but a purchase. There is no reason however in this rule. If personal property be given to the wife during coverture. it is a gift to the husband, unless given to her separate use. So if a chose in action be given to her. it belongs to him absolutely without being reduced to possession. & a suit may be brought upon it in his name without joining his wife.

28

2d. Rep. 134.

All the property which she acquires by her skill & industry during cohabitation is absolutely his. Co. Lit. 351. it. 11th 251. Sal. 114. 4 Nov 1567.
 A woman may own property which will not be out of the reach of the husband's control; as if property be given to trustees ^{in trust} for the sole & separate ^{interest} of the wife. As to technical words are necessary to give her such a separate interest: it is sufficient if such appear to have been the intention of the donor. 22r 659. 5 Hk 343. And if he lend the husband money arising from her separate use, she may prove ~~the debt~~ under a count of Bankrupt him. 11 Mod 440. so the husband may sell property upon to her separate use before marriage.

Contracts between a Husband & Wife

It is a general rule of law that a husband cannot contract with his wife. An executory contract entered into after marriage by them to ~~sure~~ ^{sure} would not be good; for as the wife is not bound by it, there would be no reciprocity. But I know of no principle which would invalidate an executed contract between them, as a gift of property to her, tho' the authorities, it is true, are against it. They are said to be but one person in law & therefore, he can no more contract with her than he can with himself, but there is no sense in the maxim; & even in Eng. a conveyance may be made by the husband to a third person, & from him immediately to the wife. So also, by way of use an estate may be conveyed by the husband directly to the wife, as a conveyance to a third person to the use of his wife. Co. Lit. 114.
 And in Eng. a conveyance by the husband ^{to the wife} before marriage ^{after her sole, separate use & good & lawful disposition for} the execution during the cohabitation, contracts made between husband & wife before the cohabitation to be executed during cohabitation, or after.

Baron & Hume.

its determination, are binding on him. *Hob. 216. Hut 17. Co. Ja 571.* A distinction between a debt contracted by the husband with the wife & a covenant to leave her a sum of money, that the former is avoided by intermarriage, that the latter is not. From these principles

28 then arose a question whether a bond given by the husband to the wife anterior to the marriage conditioned to leave her a sum of money, was avoided by the intermarriage & it was decided by two Judges against one that it was not. *Sid 248. Cartt 511.*

The English writers, however, say the latter opinion is the other way, but I apprehend the decision to have been right, & that the bond should be considered as a covenant. But however much bonds ~~are~~ may be considered in law, they are good in *Eq. 2. Dec 476. 1 Vent 343. Dec 14 1737.*

How far the wife is bound by her contracts.

It is a general rule that a feme covert cannot bind herself her property by her contracts. But to this rule there are several exceptions. Her inability to contract arises from two considerations, first no marital rights of the husband are to be invaded by her contracts. If she were bound by her contracts she would be liable to be taken away from her husband & imprisoned which would affect his most important marital right, a right which is paramount to all other considerations viz the right to the use of her person. If she were allowed to bind her real property (for personal property she is supposed to have none) by her contracts, the husband's usufruct another of his marital rights, might be taken from him. Secondly the wife is supposed to be under the influence of her husband & liable to be coerced by him. Therefore to prevent her

from affecting the rights of the husband by her contracts & to secure her property from the hands of a tyrannical husband, the law has taken from her the power of contracting. Whence these objections are removed a feme covert is as competent to bind herself by her contracts as any person whatever: for coverture of itself is no disability, & whatever may have been the ostensible grounds of the decisions & the reasons given in those cases where a feme has been considered as bound by her contracts, it will be found, that these considerations, are the only ones which have any weight. It was very early decided, that where the husband had absconded the wife, was bound by her contracts. 10 L. 133. 1107 & 54. And in more modern cases, it has been determined that where the husband is an alien enemy, the wife is bound by her contracts. 1 Sal 116.

So where the husband is transported? The late years which has made a considerable figure in Eng. was, whether a wife living separate from her husband, by articles of agreement & having a separate maintenance, allowed her by her husband, was bound by her contracts. Now it is to be observed that in Eng. (how it may be considered in Con 29 is a ques) articles of separation between husband & wife are binding upon the parties, the husband has no control over the wife, so that her person & her property are entirely out of his reach, & neither party can rescind the articles without the other. 1 B. & W. 542. 1 H. Bla 334.

The first case in which the ques arose, was, where the husband lived in Ireland & the wife, in Eng. upon a separate maintenance, & in that case it was decided that the wife was liable to her contracts. It is true considerable stress was laid upon the circumstance of the

Baron & Tempe.

husbands living in Ireland; but the case of *Croft v. Phipps* came before the Ct. decided of any such circumstance, for there the husband & wife both lived in Eng. & it was held by the whole Ct. that her contracts were binding on her. *Dumy* 5. In the argument of this case too, considerable is laid upon her having a separate maintenance, which, I apprehend makes no kind of difference for whether she has any property or not the reason & ground of her liability are the same. many other arguments the Ct. are equally satisfied & are completely refuted by those in his essay on Contracts, but whatever the grounds of the decision may have been the decision itself was perfectly right. In all these cases it will be found that before mentioned principles were the governing ones. And at the the wife has a separate property she cannot bind herself by her contracts, while living under his coercion. tho in *Chy* she may such separate property. 1 D. & B. 16. 20th 374.

How far she may bind her husband.

When the wife contracts for the husband with his assent. & for his benefit he is bound, not however, because she is his wife, for in this case she acts as his agent & can bind him no farther than any other agent of his; so a servant, or child might bind him in the same manner. It is said that he is bound by her contracts only where he gives his assent to them, & that the law implies his assent when it is not expressly given even in cases where it would be preposterous to believe it. But this is not the true ground of his liability for in many cases, so far from any presumption of assent appearing, the contrary is expressly shown. & yet he is bound. In some cases it is true he is bound solely on the ground of his assent. 3 Mils. 384.

Whereas the wife purchases articles which come to his use or to the use of his family, he is bound by such contract, of the wife on the ground of implied assent. It is the duty of the husband to provide for the wife & so long as she conducts as a dutiful wife, he cannot divert himself of this obligation. Therefore if he turns her out of doors, without just cause, he is bound by her contracts for necessaries, tho' he expressly forbids any person trusting her. *Tha. 1214.* But if she elope with an adulterer, he is not bound by her contracts, even for necessaries, for all obligations to support her are then dissolved. *Tha 706. 875. 1122.*

Nor if she has committed adultery, unless the husd. suffer her to live in his house & the cred. has no knowledge of the adultery. *1 Bos & Pul. 226. 2 Wms & Sta 291-2.* It would seem unreasonable, that if the wife elope from the husband & immediately purchase necessaries, before the elopement became a matter of notoriety, he ought to be answerable; but the English Ct. proceeding upon a mistaken principle, have decided otherwise. *Tha 697. 2 Kay 449. Wad 118.* Where the wife has separate propy by which she makes gain, the accusation is her own & her husband has no control over either, nor is it liable to his debts. *2 Wms & Sta 316.* Where the husband & wife separate by consent, & she has a separate propy he is not to be chargeable for her necessaries if such separation be generally known, tho' the Cred. has no notice of it. *Sa 116. 2 Kay 449. 1 Wad 71.* And where the husband is indebted to the wife for her separate propy she may prove such debt under a commission of Bankruptcy against him.

Baron & Borne.

If money be lent to the wife to purchase necessaries, which is actually laid out for that purpose, it has been considered as analogous to the case of infancy. & the husband not liable at Law & in Chy only to the value of the goods. *Re 21. 582.* It would have discovered little more liberality in Ch of Chy if it had been decided that he should be liable to the amount of money lent, tho the goods might have hapned to be purchased at an over value. If a feme covert be a lessee & at the time of her marriage rent be in arrears, both the husband & wife are liable, but for rent which accrued during coverture, the husband only is liable. *1 Rot 351.*

Of torts committed on the person of the wife.

21. If a tort be committed on the person of the wife, she is entitled to the damages, but he must join in the suit. & when the damages are actually recovered they belong to him. He may also have a separate action for his special damage.

If an injury be committed to her real property, if it be an injury to the inheritance, the right of action belongs to her, until an actual recovery by the husband & wife, but if the injury be to the property only the right of action belongs solely to him. *2 Rot 586.*
 A case of an injury to her separate personal property has ever been determined?

A feme covert may execute a power as well as any other person, as a power be given to her to convey lands by deed or devise & in such case her act does not bind her, for it is supposed to be that of the principle & she but an atty. *Co Lit 116, 1 Rot. 329.*

If the wife be entitled to an annuity, or rent, the husband acquires an interest in it no longer than the coverture continues. Therefore tho it be in the nature of a chose in action he cannot release or dispose of it, so as to affect her right, after his death. Moor 572.

An infant husband is bound by the contracts of his wife as well as an adult, tho he is not bound by his own contracts. Barnes 95.

Formerly the husband was supposed to have the same power over the person of his wife, that he had of his children or villain, that he might give her proper chastisement & might confine her if she squandered his estate or kept bad company. Stra 478.

But such arbitrary power over the wife would not probably be allowed the husband at the present day. In husband & wife, should join in lease of her lands, in Eng^d without observing the requisites of stat^s such lease would not be binding upon her after the determination of the coverture, but it would not be absolutely void, for she may confirm it after her husband's death, & then it will bind her 1 Rob 344.

It has now been decided in Con whether such lease would be binding upon the wife, tho it is an ^{un}acknowledged principle in Con. as well as in Eng^d, that a feme covert cannot bind herself by her personal contracts, yet as it is so firmly established that that the husband & wife may convey her real property it is highly probable that, such lease would be considered as binding upon her. If the wife be entitled to a contingent legacy, the husband may release it ²² even before the contingency happens, & 1 P^{ar}son 617.
If the husband has made a settlement upon the wife at the time of the marriage, he is considered as purchaser of the chose in action, & shall

Baron & Ferme

have them absolutely, tho he has not reduced them to possession during the coverture. 1 Sal 102.

When the husband & wife must join in an action, then the right of action would survive to the wife if the husband should die before the action brot. the husband & wife must join in the suit; as in actions for the recovery of real estate or choses in action. 1 Kol 347. 2 Co 537. 1 Hk 224. 423.

Bride 63 p 114. So where the wife was entitled to damages for any tort committed before or after marriage. Yelc 79. Croja 581. 558. 60 Ca 96.

If the suit be brot by the husband, or wife alone in any of these cases, this is an informality, in which the Dept may take advantage by plea in abatement, but in no other way. 3 Pump 617.

If the right of action would not survive to the wife, it would seem that she ought not to be joined, but there are many cases where she may join tho the ^{right} action would not survive to her, this is where she or her property has been the mentioned cause of action; as if a promise be made to the wife, or a bond be given her, or husband & wife jointly, or to her before coverture 1 Wood 445. or a trespass be committed on her land, which is an injury only to her possession during coverture. In all these cases she is allowed to join, unless her joining would occasion an absurdity, as in an action per quod consortium amittit. Croja 77. 205; 1 S 245; 3 Le 403. 12 Co 96. 2 Mod 217. 1 Kol 518. 1 Kent 261. 2 Le 107. Croja 442. 1 Sal 106. Croja 581. 2 Kol 556. Sta 477.

But in a suit for her earnings & no express promise made to her, she cannot join 1 Sal 114. 1 Wood 445.

When they must be joined.

When the action could survive against the wife in the event of

the husband's death the suit must be brought against both husband & wife 100 l 6-3 4. Pl 343.

If one battery be committed by the husband & another by the wife & they are joined in a suit for both batteries & a verdict be given against both it is said that judgment will not be arrested. the advantage might have been taken in a previous stage of the suit, but I should apprehend that the joining of both batteries in a suit in which the wife was joined would be a good cause for arresting the judgment. It is however agreed that if the husband in such case be found not guilty no judgment can be given against the wife. 100 l.

If the husband & wife join in action for a battery committed on both it is said but if the jury find, as to the battery on the husband not guilty & guilty as to the other the verdict will be good, otherwise if the Def^t had been found guilty as to the battery of the husband or as to that, there had been no finding. 100 l. 16. 2 Vent 29. Cro Jac 664. So if the verdict had found the Def^t guilty as to both parties with several damages; if the husband will release the damages as to his battery they may take judgment for the residue 1 Vent 324.

If husband & wife be arrested on mesne process for the debt of the wife she is to be discharged on filing common bail; otherwise when taken in execution. Barnes 46. Mils. 124.

Therefore if the same law prevails here she must be discharged without putting in bail at all, since we have none but special bail. When the wife applies to a Ct of Chy the husband is generally to be joined. tho that Ct will take care that he have no benefit of the ~~free decree~~ Mils 274.

Baron & Wife.

It is not necessary, however that he should join; for she may & the suit be against him, must sue by procaine ami, if she can conveniently. But if the suit be against the husband & she has no procaine ami, which she can conveniently join she may sue alone, 222 452.

Witnesses for & against each other.

It is a general rule that husband & wife cannot be witnesses for or against each other either at law or in Chy neither shall she be a witness against her husband tho he might be admitted to swear against himself and even the ad parties should consent. she shall not be admitted when her husband is a party; for it might tend to disturb domestic peace & happiness. There is an exception however in Eng. in the case of treason. But whether that exception would be recognised in Con is uncertain. Another exception where ^{before} has been guilty of a personal abuse to the wife; the first case in which this ques. was so decided, was D Dudley, case. Hut 115; That case has been much clamored against & frequently denied to be law. but I receive it to be good law. That present is settled in Eng. Sta 633.

Marriage

The contract of marriage is celebrated in a different manner from all others. In Eng. by stat. every marriage must be celebrated by a person in holy orders or it is void. In Con it must be by a Justice of the Peace or some magistrate who has the authority of a Justice of the Peace, within limits of his

jurisdiction, or by a clergyman who is settled in the ministry.
An action of Breach, the only case when it is needful to prove actual
mar. 3. Nov. 1794. Whether a marriage by any other person would be
ipso facto void is made a ques. If any person not authorised by stat
should attempt to marry a couple he would be punishable, but
if apprehended a marriage was seriously intended by the parties
such marriage would be valid 1 Sal 126, 457-8.

So if a person authorised would marry a couple when there has been
no publication or without consent of parents or guardians, he is liable
to the penalties of the stat. but the marriage is valid.

By stat Hen 8. no prohibition or gods law except shall impeach any
marriage without the spiritual degrees. Therefore all marriages
within the spiritual degrees or which are contrary to gods law are void.
Those which are supposed to be prohibited by gods law are when there
is a prior marriage, a precontract, or incestuity, in either of these
cases the marriage is ipso facto void. In the English law no divorce is
necessary to annul it, Bro & 857.

But when the marriage is within the spiritual degrees it is a good cause
of divorce, but the marriage is good until the divorce takes place. & if
the parties be not divorced, their ^{mar} cannot be had in law. 1 Wils 422, 36.

By our law a marriage may be void by reason of a prior marriage as in
Eng. & also our law prohibits all marriages within the spiritual degrees.

All such marriages by our law are absolutely void. tho by the Eng
law they are voidable by divorce only through 219, 220, 241, 251, Hen 8.

By our law precontract is no objection to a marriage —

— All marriages between persons who are consanguineous or affines are within the
spiritual degrees

then the stat says that all persons & may marry. This is to be understood all persons capable of entering into other contracts; therefore an idiot cannot contract in matrimony. He once decided otherwise 1101 346. This decision, however is now of knowledge not be law.

Infants may contract in matrimony. male at 14 years of age & female at 12. & the in Eng they are frequently married under that age, yet when they arrive to that age they may avoid the marriage by their dissent 1101 341. 1201 79. In general, concubinage & cohabitation as man & wife, or the acknowledgment of the parties may be admitted as evidence to prove the marriage 1101 341. 1201 79.

95

Divorces

Divorces are of two kinds, a vinculo matrimonii, & a mensa et thoro. The former absolutely destroys the marriage so that the parties may marry again; the latter only gives the parties liberty to live separate, entitles the wife to her earnings & releases the husband from supporting her; but the parties have no right to marry again. The causes of a divorce a vinculo are such as would avoid the marriage at the time it was entered into, the causes of a divorce a mensa are such as arise subsequent to the marriage as adultery &c. 1201 236. 56 98. Sometimes, however, divorces ^{vinculo} are granted by Parliament for adultery. By our stat. all ^{vinculo} divorces are absolutely void, because the ince of such marriages are bastards. But is otherwise by the Eng law 1201 462. When the ecclesiastical divorces a mensa, alimony is ~~granted~~ is allowed the wife. The causes for which the Sub. Ct. by stat may grant divorces

are fraudulent contract, nuptial absence with total neglect of every conjugal duty, for three years, adultery, & seven years absence unheeded. In the last case no divorce is necessary for such absence is presumption that the husband is dead, that the wife will be justifiable in marrying again. For that ground it is that administration will be granted on such persons estate. Solved by the Sup. Ct on a prosecution against the wife for a second marriage. There is nothing said in the stat. about precontract, or intemperance, but under the word fraudulent contract, the latter has been held to be included. So it has been contended that precontract is included under fraudulent contract, but I apprehend it is not. All other causes of divorce are cognisable only in the general Assembly & those most commonly, propter incontinentiam & propter suavitatem. For these causes the Assembly grant divorces a vinculo & a mensa, at their pleasure. Where the husband is the faulty party, the wife is by stat. entitled to divorce: but where she is the faulty party, the husband is not entitled to recovey. The Sup. Ct when they grant a divorce may set aside a part of the husband's estate, not exceeding one third to the wife & when set aside it will vest in her. If his property be inalienable some difficulty may arise in estimating it. But where the husband's property, raises notes of hand, the Court made an order on estimate & it as they could & ordered him to pay her a thousand pounds under the penalty of two thousand. The husband thinking that the Ct had no authority to make such an order neglected to pay it & a writ was brought for the penalty & recovery had, which an a. mit. & per. was affirmed by the Sup. Ct. & ex. m. For the manner of serving a bill in divorce on the proceedings thereon see statute Law —

The first of these is the fact that the
 number of cases of the disease is
 increasing. This is due to the fact
 that the disease is becoming more
 common in the population. The
 second fact is that the disease is
 becoming more severe. This is due
 to the fact that the disease is
 becoming more common in the
 population. The third fact is that
 the disease is becoming more
 common in the population. The
 fourth fact is that the disease is
 becoming more common in the
 population. The fifth fact is that
 the disease is becoming more
 common in the population. The
 sixth fact is that the disease is
 becoming more common in the
 population. The seventh fact is
 that the disease is becoming more
 common in the population. The
 eighth fact is that the disease is
 becoming more common in the
 population. The ninth fact is that
 the disease is becoming more
 common in the population. The
 tenth fact is that the disease is
 becoming more common in the
 population.

Parent & Child

29 By the word child in its general acceptation is meant any one in the line of filiation: tho it is frequently used as synonymous with infant for minor. which any person under the age of 21 years, 3 Blk 118. An illegitimate child is called in law *natus filius* or *filius populi*. The policy of the law does not for certain purposes recognise the relation between an illegitimate child & his parent, yet for other purposes it clearly does; for if an illegitimate child marry within the Levitical degrees, it is incest 12 Hargl. 8, 5 Mod 168, Combs 368; Com. Ket. 2. so it has been holden under the stat 2 Geo 2 which requires the consent of parents or guardians to all marriages ^{of minors} under the age of 21 years, that such consent was equally necessary to the validity of an illegitimate child's marriage as any other. It is laid down by Justice B. all. that the maxim, that an illegitimate child *natus filius* or *filius populi*, applies only to inheritances Durnell 100-1.

Parent & Child

57

So it is said by Coke that a bastard is quasi nullius filius because he cannot inherit. *Co Litt 123.*

Full age or the age of majority is different according to the laws of different countries. tho at common law, & also by our own laws it is for most purposes, fixed at the age of 21 years. Tho the incapacity of an infant is called a disability, yet it is intended for his benefit & protection. And the age of seven years an infant cannot be punished for any crime. At 14 he may be capitally punished. Between the age of 7 & 14 his liability to punishment depends on his actual discretion. the presumption of law, however is incapax dol, & in order to render him liable, his discretion must be proved. But if he be above the age of 14, he is presumed to be doli capax. until his want of discretion be proved. *1 Bla 464. 4 M. 22. 1 Haro 1, 2. Co Litt 247. b. Just 70. 2.*

It has been said that between the age of 7 & 10 the presumption is in favor of his indiscretion. & that between 10 & 14, the presumption is against it. & throws the onus probandi on the infant, but this distinction is not warranted by law. *1 Haro 1. 1 Hall 25. 7.*

Tho it is a general rule that infants above the age of 14 are punishable for crimes, yet there are some exceptions for in some cases, tho above the age of 14 they are exempted from punishment on the ground of lunacy.

This exemption it is said takes place in some misdemeanors, but what those misdemeanors are does not appear: the only one specified is that arising from ^anonfeasance, or omission. *4 Blac 22. 1 Hall 22. 2. Haro 364. a. Co Litt 246. b.*

When infants are indicted or otherwise prosecuted for crimes, it is said, tho they ought not to receive them to be indicted

Parent & Child.

in confession Fort 71. Capa 466, there is one instance in the Books in which an infant under the age of 7 years was pardoned for homicide from which it has by some been inferred that an infant under that must be punished, but this conclusion does by no means necessarily follow 4 Bla 337, Pow 19. Fort 439. Cor 212-3.

Another privilege of infancy, tho, generally called a disability is that an infant cannot make a contract, which will be binding on him 1 Rot 729. In Eng the age at which an infant, whether male or female may choose a guardian is 14 for many other purposes, this is the age of discretion, but in Con a female at the age of twelve may choose a guardian.

An infant in rentes or a mar may be appointed Ex^r but he can not until he arrives at age of 17, before that time an ad^r dum te minoritate must be appointed 1 Com 235; 5 Co 29. Henke 207. 10 Bac 121. But tho an infant may be an ex^r & act as such at the age of 14 yet no one can act as ad^r till he is 21 years old. Tho it is laid down that no one can act as ad^r until 21. yet I apprehend that no one under that age can be an ad^r, it is to be that he cannot give bonds for the faithful discharge of his trusts.

As to the stat of Con requiring Ex^r to give bonds it is doubtful whether an infant can act as Ex^r in Con but if he can it must follow that his bond would be binding on him, for it would absurd for the stat to require a thing which would be nugatory.

The stat does not expressly say that an infant above the age of 14 may act as Ex^r, but an infant at the age of 14 may make

a will of his personal property, & it is a general rule that whoever may make a will of personal property, may act as executor, *1 Bro 135.*

If an infant at the age of 7 may be betrothed or given in marriage, above the age of 9, she may be entitled to dower, *11 Geo 2 L. 134. 136. 137. 463.*

Full age is completed on the day preceding the 1st of January next after her birth, *Sal 49. 615. 2 May 486. 1796.*

Of the liability of Infants for their torts.

Infants of any age are liable civiliter for their torts &c. as is an idiot or mad man. *Art. 134-7. 1 Wood 410.* for the intent does not determine their liability, tho' they are not liable criminaliter, unless they are capable of reason, *14 Am D. 121. 847. Dyer 105. 17 Am D. 1. 2 in 345.*

It seems however that an infant under the age of 14 is not liable for slander, *Key 129. 3 Bro 132.* Infants are not liable civiliter for deceit or fraud, *11 Geo 2 L. 134. 136. 137. 17 Am D. 1. 2 in 345-13. 200. 179. 272.*

This rule seems to be exploded by *L. Mansfield, 3 Bro. 181.*

But tho' an infant is not liable civiliter for fraud, yet he may be indicted as a common cheat, & also he may be indicted on the stat. for obtaining goods by fraudulent pretences, *3 Bro 132.*

It seems then to be a general rule that an infant is liable civiliter, only for those wrongs, which are accompanied with some kind of violence, either actual or implied, *1st Hel 914.*

It is said by two chief justices, *Barke & Gorton*, that if an infant take upon him to trade & hold himself out to the world as a person of full age, he shall be presumed to be of full age & shall be liable to his contracts, *2 in 203.*

This however seems not the law.

Parent & Child

The infant is not liable at law on a contract procured by his fraud
nor liable on the ground of fraud, yet a Ch. Ch. will in some cases hold
him to his agreement, by preventing him from taking advantage
42 of his nonage 13 E. 1. 536. 2 E. 1. 489. 4 Ed. 3. 17. 1. 1 Br. Ch. 358.

But this can never be done where the contract is void. 14 Bl. 75. 1 Font. 71.
Infants at different periods are capable of performing different acts,
An infant at the age of 14, if a male & 12, if a female, may, in the civil
law make a real & personal property, if his discretion be actually proved.
So the civil law governs in the ecclesiastical Ch. in Eng. where, these
ages are determined the rule must be the same, Co. L. 89. Br. Ch. 316. 1 Bl.
463. 28. 947. 22. 116. In law the age for this purpose is 17. in both
males & females, stat. 13. An infant, while maintained by his father
is his servant, & he is entitled to all his earnings. 1 Br. 433.

Some stat. creating offences include infants tho they are not named
others do not extend to them unless they are expressly named. If
the stat. make it such an offence as at common law is corporally
punished, an infant may be corporally punished, if he commit
the offence, as if a stat. should declare it felony to cut down a tree
in the high way. But if the stat. does not constitute ^{that} such
an offence as is corporally punished at common law, an infant
cannot be corporally punished under such stat. unless expressly
named in such stat. As if a stat. should declare that whoever
should cut down a tree in the high way should be punished
with death, or imprisonment. 1 H. 6. 21. 2 Co. L. 247. 19 E. 1. 571. 3 Br. 131-2
14 E. 1. 47. Cro. Jac. 274. H. 10. 364.

In the latter case the punishment is said to be collateral, & therefore the rule is sometimes laid down that where the corporal part is collateral, an infant is not liable to be corporally punished. But where the offence is also punishable at common law, the common law punishment may be inflicted on an infant.

Of the liability of Infants to their Contracts.

It is a general rule that infants are incapable of contracting. But if an infant ^{joins} with an adult the latter is bound, unless the contract be void, tho' the former is not, which is an exception to the general rule that all contracts must be mutual. 11 Bro C 38. 11 Bro 257. 12 Bro 31. 12 Bro 104. 13 Bro 148. Parties in blood may take advantage of the other insane, therefore an infant make a judgment & die his heir may avoid it. But parties in estate generally can take no advantage of the other insane, therefore if an infant joint tenant, alien & die his cotenant cannot avoid the deed. Parties in law, as lord & tenant, can never take advantage of insanity. 24 Bro 423. The rule is the same in Equity q. 11. 393.

Altho' the infant has received the full consideration, yet he may disaffirm the contract: it seems odd, not be liable to refund the considⁿ. 1 Bro 129. 12 Bro 169. 3 Bro 140. 12 Bro 413-14. On principle I should apprehend the infant in such case ought to be compelled to refund what he has received for the contract being disaffirmed as though it had never occurred, ungrat. Reformation reason, that the party was in fault for trusting the infant with the property & giving him opportunity to squander it. For necessities, however, may bind himself. Necessaries consist of four articles viz food, raiment, medicine, & instruction, Co Let 172. 3 Bro 163. 1 Bro 729. 1 Bro 112. 4 Bro 499. —

Parent & Child

But in order to make him liable for these things they must have been necessary for him at the time the contract was made & whether they were necessary or not is a matter of fact to be determined by the jury. When the def^t pleads infancy to a contract for necessities the pl^t must reply that it was for articles which was necessary for him at the time of the contract. The articles must also be suitable to the infant's rank & estate. It is sometimes said ~~that~~ that whether ^{the articles} were necessary to the infant is a question for the Ct to determine & so decided in Cro & El 583.

What articles are properly called necessities is a question of law for the Ct to determine but whether such articles as are deemed necessary in law, were necessary for the infant at the time of the contract is a mere question of fact for the consideration of the jury. 10 P. 151, Pal 661, 10 P. 161, 11 C. 1, 3 P. 132-3.

An infant who is capable of contracting in matrimony is bound by all such contracts, as are incident thereto, which are necessary to carry the principle contract into complete execution. 11 C. 118, Car 115, 6 P. 161.

If an infant marry before of full age he is liable for debts contracted before marriage. Barnes 95. But if an infant be under the actual protection & government of a parent or guardian & that government be duly administered, & that protection duly afforded he cannot bind himself by any contract for necessities. 2 Black Rep 1325.

44 Therefore an infant can bind himself for necessities only in three cases, 1st when he has no parent or guardian, 2nd when he is out of the reach of his parent or guardian so that he cannot provide

for him, & when the parent or guardian neglects to provide for him. In the two last cases, however, the parent or guardian is not discharged of his liability. Tho the infant in these cases is bound for necessities, & he is not bound by the terms of his contract, not to the value of the necessities only, as upon a quantum contract, 3 Mac 135 & 136, 583, Latch 164.

As an infant may bind himself for necessaries, so he cannot bind himself
if any may which an adult can he cannot bind himself in a penal
bond Moor 179. Es 88 920. 1100 955. 1180 729. Es 169.

382. 413. 1st & 35. An infant is not bound by a negotia tite, nec, ordinabile.

for necessities. If he actually negotiated with the note he not negotiable, or if
negotiable, if it be not actually negotiated he is bound by it, 12 and 13, 11th ed. 44. in re
Deary 46. Louis an infant is not bound by, nor can he sue in an

The rule is the same in the case of a bill of exchange, as that respecting a note of hand, as between the original parties the instant bound by it: but otherwise when negotiated. 1706/73

The reason frequently assigned in the books why an infant shall not be bound by a penal bond, is that it cannot be for his benefit. But the true reason of the distinction, in all the above cases, is that in those contracts, where he is made liable, the consideration may be enquired into; but when the consideration cannot be enquired into the infant is not bound. *3 Bac. Max. in. Term. 40. 6.*

an infant is bound by a single bill, & yet it is said the court cannot be enquired into, the fact however is that when the rule is

Parent & Child.

an infants liability in a single Bill, was established. the consid-
 & all single Bills might be enquired into, & tho the reason has failed
 the rule still continues, notwithstanding the maxim, a nate ratione
 a fiat est in reg. 1 Keb 344. 416. 25. 1 Ker 76.

45th But it seems to be agreed in Durnf 46. that the consid- of a single Bill
 given by an infant is still examinable.

The consid- of a note of hand, not negotiable may be examined, & so may the
 consid- of a negotiable note, if not actually negotiated 11 Mod 49. 3 in. v. 1 Bos. 36.

But if a negotiable note has been actually negotiated, as between the maker &
 the endorsee, there can be no enquiry into the consid- Durnf 46. 2. Kay 289 153. Dougl 14.

Formerly, in an assumpsit compulso bent, the items of the account could not
 be examined, & then it was, that the rule was established, that infants were
 not bound by an assumpsit compulso bent. & so sometimes, the now it is
 settled, that the items of the account may be examined into in such actions.
 Durnf 40. Latoh 169. Crofts 60. 2 Wyl 37. Pat 524.

So the consid- of a Bill of exchange, as between the original parties, may
 be enquired into, but when the bill has been negotiated there can, as between
 the holder & drawer be no enquiry into the consid- 1 Bos 75.

From a case in Carthew it has, by some, been supposed that an infant
 would in no case be bound by a Bill of exchange. But the fact was, in
 that case, it did not appear that the Bill was given for necessaries, the
 action was tried on a bill of exchange generally, the Deft pleaded
 infancy, & the Plt did not reply that the bill was given for necessaries,
 but demurred to the plea, supposing, that by the law merchant, the
 infant would be bound by the bill & judg^t was given for the plea. Carth-
 160—

If a penal bond given by an ^{infant} for necessities be only voidable, he can not be sued on the original contract, for that is merged in the specialty. But if it be void, then he may be sued on the original penal contract, for a voidable specialty will merge a penal contract but one absolutely will not, whether such penal be void, will hereafter be considered. So if one lend another money at play & take a receipt for it, that receipt is merely void, & the borrower may be sued on the penal contract, for that is not merged. Exp 90. 3 Burr 1078. The 1249.

So a bona fide contract is not avoided by a subsequent vicious contract, for the second contract being absolutely void, does not merge the original agreement. 1 Hble 464. Exp 178-C. 11 Ann 109 to 116.

If an infant give a single Bill for necessities, he must be sued on the bill, & not on the original contract, for a single Bill merges the original penal contract. And if an infant give a single Bill for goods not necessities, & after arriving at full age promise to pay for them, he is not bound by such promise, for the original agreement being completely merged in the specialty, it is no consideration for the promise. Exp 164. Bull 115.

Tho a note in law be considered as a specialty, yet the consideration may be enquired into when given by an infant. (See note & Root 109. an abominable case). For money lent, an infant is never liable, unless it be actively expended for necessities & at law he is not liable unless the lender laid it out himself (contra see Dray 544. the note law) But in Eq. he is liable, tho it be not laid out by the lender, for he stands in the place of the seller, & will recover no more than the actual

Parent & Child

Necessaries Jul 174. 587. 5 Nov 568. 119 Nov 67. 11 Nov 558.

Is an infant may bind himself for necessaries, yet he is not bound by no contract or any article in the line of his trade, however necessary it may be for his trade or profession. & however, such profitable trade may be *Enda* 494. *Stu* 1083. *ca* 279. 1 Nov 729. 1 Nov 56.

It is generally true that an infant is bound by a decree in a quarrel, & in fine, but he is not bound to that extent that an adult is, for he has pigmonter allowed him after he arrives at full age to impeach the decree, if he can show any fraud, mistake, or error, but he cannot get the decree aside merely because he was an infant. 11 Nov 411. 386. 354. 4 Nov 128. 12. 295. 11 Nov 509. 2 Nov 419. 2 Nov 626.

According to *Distracted*, an infant is as much bound by a decree as an adult, but according to *Hardwick* he is bound unless, unless there has been some gross negligence or fraud in his procuring a decree. 2 Nov 518. 3 Nov 626. 1 Nov 75.

If an infant does an act which he is compellable to do either in law or equity, he is bound by it. *Co* 114 72a 513. a 5 Burr 1761 *ca* 46 48. 1 Nov 575. -

And this I apprehend is the only class of contracts, for these are a kind of contracts, except those for necessaries, by which an infant is bound at law.

47 If an infant do an act by virtue of authority given him which is the regular performance of that authority given him, it is valid. 5 Burr 1762. This rule does not at all interfere with the one next before mentioned. If an infant ratifies a voidable contract after coming of full age it is binding on him, otherwise if the contract was void the 696. 11 Nov 203. 1 Nov 477.

Parent & Child

61

When the P^lff replies to a plea of infancy, that the Def^t tutored his promise after coming of age, it is sufficient for the P^lff to prove a promise subsequent to the contract, & he is not obliged to prove, that the Def^t was of age when he made the second promise, for whether he was of age or not is a fact within the Def^t's knowledge, & he would take advantage of it he must prove it. *1 Durnf 698. B. & L. 109. Durnf 766. 1 Mood 403.*

The contracts of ~~an~~ infants which are not binding, are either void or voidable. A void contract is one which is ab initio, or men nullity, & which creates no obligation or semblance of right. A voidable contract is one which is good, until avoided by a due course of law.

The contracts of infants are now more frequently declared only voidable than they were formerly. ~~Black. 2. in n.~~ It is laid down as a general rule that the contracts of infants respecting real property are void, & those respecting personal property voidable only. *1 Wm. 6 32* This rule I suppose is meant to apply only to contracts of sale or conveyance. But the distinction is by no means a perfect one. The proper distinction, as applicable to contracts of this kind is that where the thing contracted about is delivered by the infant, either actually or constructively, the contract is only voidable, but if there be no manual delivery, the contract is void. Therefore a bargain is only voidable, for there is an actual delivery. So where the right of property descends, there is an actual delivery of the land. But an infants power, ~~as to~~ to convey a right to another is absolutely void. *3 Bur 1804. D. Per. 12. 1 Ha. 577. 4. 1 Hol. Rep. 24. 110. 130. 3 Mac 136.*

Who a power of ~~settly~~ by an infant to deliver ^{void} ~~is~~ a power of ~~settly~~ to accept ^{void} is only voidable. *1 Hol 730. 3 Mac 136.*

The grantee or lessee, if an infant cannot disaffirm the grant or lease, therefore it is only voidable 1 Foul 74. 1 Mod 15. 3 Burr 186.

4th The rule before mentioned applies as well to sales or conveyances of personal property as of real, for if personal property be delivered by the infant the contract is only voidable, but if it be not delivered actually or constructively it is void & if the party take the property he is liable in trespass. 12. 14. 21. 1 Rob 736. 1 Mod 137. 406 77. Latet 10. 5 Bae 139.

It is laid down in some of the Books that the grants, leases & surrenders of an infant are void, but this cannot be law 5 Bae 337. 2 Lea 218. 3 Bae 146. 1 Bro C 313.

If a contract be void all persons may take advantage of its voidness in any way. But if it be voidable only no person can take advantage of its invalidity but the immediate ~~against~~ ^{against} the party against whom it was made void. So where the contract is void either party may take advantage of it & treat it as a nullity. 1 Sta 938. 1 Bae 142. 2 Mod 380. East 436. 1 De mof 663. 4 Co 570. 5 Co 643. 4 Co 425 44. 1 Foul 74.

Where the real contract of an infant is only voidable none but the infant or his proxy in law can take advantage of it. But when the contract is personal his Exor or Admin^r are the proper persons to avoid it. It is sometimes laid down as a general rule, that if there be a benefit, or a resemblance of benefit arising to the infant the contract is only voidable, otherwise void Moor 105. 1 Bro C 337. 1 Mod 730.

On this ground it is said the power of debt of an infant to accept & sign his contracts of purchases are only voidable 1 Exch 23. 4. 1 Rob 730. So on this ground it is said the lease of an infant which renunes no rent is void. But it is said by Mr Mansfield that there has never been any

decision that such lease is void, & there are opposite decisions to the contrary, 2 Durnf 161. 3 Burr 1406. 1 Blw Rep 574. 1 Foul 74. 1 And 254. 99 in 395 ff. The logic in such a case cannot consider the lease as a nullity, therefore it can be only voidable. So in the case of grants the grantee cannot take advantage of the invalidity of the grant.

This rule (that if there be not a benefit or a semblance of a benefit to the infant the contract is void) tho' it is laid down as a general restrictive rule, I apprehend to be only a qualification of the former general rule. Therefore that rule with this qualification will stand thus; where there has been a delivery by the infant of the thing contracted about the contract is voidable only, unless the privilege of the infant cannot be proved without considering it void, 3 Hbl 364. 3 And 154. 1 Blw Rep 574. The penal bond of an infant is generally considered void, because there is no semblance of benefit to the infant 1 Port 654. Cro El 922. 1 Hbl 724. But 106. Exp 164. It is, however, laid down in other books that it is voidable only, & so seems to be the opinion 2 Hanfield 1 Bond 403. Cro El 154. 172. 1 Foul 74. 3 Burr 1408. If the general rule before laid down applies to bonds (tho' it is supposed to apply to contracts of sale only,) the penal bond of an infant which takes effect by delivery is voidable only, for it cannot be necessary in order to preserve the infant's privilege to construe it void, & neither reason for considering the penal bond of an infant as voidable only, is, that is an infant will that all his debts be paid especially those which he has set his hand to. it is said his bonds shall be paid. And when bonds are spoken of generally, penal bonds are most commonly intended, for the name

Parent & Child

of Bonds belong appropriately to those, which carry a penalty, those without a penalty are more properly called Bills or single Bills. So also an infant cannot plead non est factum to a penal bond. 2 Ray 318. 5 Co 119. Gill. 2 Co 112. 3 Mac 134. 145.

It seems agreed however, that an infants power of atty is absolutely void. & yet he cannot plead non est factum, to it. 2 Ray 318. 3 Mac 144. 4. But a special non est factum, may be pleaded to an infants penal bond which seems to favor the idea that it is void 1 Mac 313.

A contract which is merely voidable may be confirmed on the infants coming of full age. (see under 119.) And this may be by a confirmation either express or implied. An express confirmation or ratification, is where the infant does some act which shows that he meant to abide the contract. As where an infant lessee remains in possession of premises, or an infant lessor accepts rent, after arriving at full age. 1 Mol 731. Bull Ch. 17 only 131-2.

So by any other act, in which discloses an intention of abiding to the contract. 6 Co 65. Co Lit 295. 171. 2 Vent 213. 2 Mac 691.

But if the contract be void, it cannot be ratified on his coming of full age, so as to render it binding on him, for as tho he attempted to confirm it, he may afterwards treat it as a mere nullity.

2 Durnf 766. 1 Mol 724. 1 Atk 334. Dony 53. 17 only 132-

50 If a lessee take a second lease of the same premises, it is considered as a surrender of the first lease. But if an infant lessee take a second lease of the same premises, without increasing or diminishing the rent, the first lease is not thereby

surrendered, for the second is absolutely void & cannot be made good by any confirmation, after the infant comes of full age, but the first lease may. 1704b 132. 11 Bow 635. The executory contracts of infants are generally voidable only. 1 Kent 51. 146 25. 137. 11 Bow 384. 11 Rich 1. The 437. In these cases the privilege of the infant cannot be affected by considering the contract voidable only. It seems lately to be a rule, that the contracts of infants, shall be considered generally voidable only, where their privilege can be preserved by such construction. A penal bond has been called in contract extended from its analogy to a deed. But I do not so consider it.

On Eng if an infant levy a fine, he may avoid it by writ of error during his infancy but not afterwards, for the record of the fine avers final fact, such presumptive evidence, that the person levying it was of full age, that it is not allowed to be contradicted by a ^{verdict of the jury} but during his infancy the judges may determine by inspecting the infant, whether he be of full age, or not, after inspection, however; they may admit other evidence to strengthen or avoid their judgment. 1 Co 12. 371a 129. 12 ic. 197. 243. 11 Bow 213.

It has been said that the judgment of an infant may be avoided during his minority or at anytime afterwards. 1 Co 12. 247. 71. 13. 194. But that he can avoid it during his infancy is not true, for tho he attempt to avoid it during infancy he may on coming of full age, affirm it, which could not do if it were void. The same rule also applies to release or lease & Release 11 Black 574. 3 Burr 1408. Darcy 166. 1 Bow 35.

Parent & Child

All what time an infant may avoid his contracts respecting
monies & prop^y & find none laid down but I presume he may do so at
any time during his minority, or afterwards.

What contracts & a good one by the not at law.
There are many cases in which an infant is bound by the not at
law as in marriage settlement agreements. The ground on which he
is made liable in these cases, is that he is capable of making the principal
contract viz the marriage; he must also be capable of making those which
are incidental to it 1 Pow 424, 1 Bro Ch 152, 3 Atk 56.

It is said to be a point not settled whether an infant can bind his real
estate by marriage settlement, 1 Foub 64th.

But this point I apprehend, is unsettled only as it respects his power
to bind his inheritance, for in one case at least, it has been decided
that he might his real estate out of inheritance 3 At 52.

But a female infant may have her right of dower by accepting a joint
ure. in a marriage settlement. 1 Bro & La 574 2 Eq Est 101-2, 122 55;
1 Bro 553. So an acceptance of a bond under a marriage settlement
will bar her of her right of dower 122 55.

So also the interest of a female infant in a money portion is bound by an agree-
ment on her marriage 3 Atk 613, Barnard 117, 1 Pow 44.

And it makes no difference in such case whether the interest of the wife
was in possession, or depending on a contingency 1 Pow 46, 4 Atk 101.

1 Williams 574, 3 Atk 604. So the agreement be inferable
from circumstances 2 Ves 60, 1 Pow 46.

It has been laid down by 2 Haulefield, that a wife may be seized in fee on her marriage, covenant in consideration of a competent settlement, with the approbation of her guardian, to settle her lands on her husband. Ezz will compel an execution of the contract. 1 P Wms 243. 1 Bro C 48.

But by 2 Haulefield it must be taken with this qualification, that she have not since at the time of her death. 3 Atk 13. 15.

The settlement in such case must not only have been a competent settlement made on her, but she must have accepted that settlement & taken possession of it after the death of her husband. 1 Bro C 116. This, however is questioned by P Wms. 1 Bro C 54.

If a male infant on a marriage with an adult, covenant that his real estate shall be settled to certain uses, he is bound thereby, & shall not be tenant by the courtesy of such estate. 1 Forb 70. 1 Bro C 545.

A Ct of Chy will not decree performance of the contract an infant unless that contract be fair & reasonable. 1 Bro C 115. 16. 152. 2 P Wms 244. 3 Atk 13. 1 P Wms 4750.

A male infant on a marriage settlement was in one instance allowed to bind an estate for lives, with consent of guardian. 2 Ch R 211. 1 Bro C 52. Sta 604.

If an infant, capable capable of making a will, bequeath personal property for the payment of debts, this creates an obligation on the Ex^r in Chy. to pay such debts. 1 Ky Ct 282. 1 Bro C 32. 3 Bro 192.

If an infant make a power of Chy. to compel's judgment which is considered, the Ct will on motion of the infant, call the parties before them & set the judgment aside, tho there is no necessity for doing so, if the judgment is absolutely void. 1 An. 536. Haulefield 376.

An infant after arriving at full age, may ratify a contract made by another in his behalf 10th 489.

Of the Infancy to execute a power.

It is agreed that an infant cannot execute a general power over real estate. As one by will should give an infant power to dispose of real ~~estate~~ property as he should think fit proper, the infant in such case could not execute that power so as bind the estate. 10th or 10th 47. 12th 29th.

But where the infant has no interest in the estate. He is not to exercise any discretion, but is a mere instrument or as it is called, a conduit pipe. If the power is special, he may execute it. Co Litt 2d a 10th 43. 9th 3d 11th 7th 14. 15. But it seems an infant cannot exercise any power over his own inheritance. 10th 43. 12th 30th.

It is said by Dr Hardwick that an infant can in no case execute a power over real estate 30th 710. But this rule is much too general. For if the infant be not interested in the estate. & is to exercise no discretion, he may execute a power over such estate so as to bind his principle to the extent of it. 10th 43. 7th.

An infant who is interested may execute a power so as to bind his personal estate. if he is enough to bequeath it by will i.e. that is if he be 17 years of age or according to some if of the age of 14 in the case of a male. & twelve in the case of a female 12th 30th. 10th 43.

53
But an infant cannot execute a power so as to bind his own inheritance, yet where an infant tenant for life was empowered to make a jointure not exceeding half the estate, a covenant to set the so much of the land on the 1st day agreed to the power given him now holden

binding 2 P Wms 229. Sta 609. This was not a power over his own inheritance, nor was his interest affected by it, for at his death, when the jointure was to take effect, his interest would cease.

Infants in ventre sa mere

An infant in born is for many purposes considered in esse. Killing a child in ventre sa mere, is a high misdemeanor. If the child be born alive & afterwards die of the wound given while in its mother's womb it is murder. 4 Blac 198. 1 Hare 79, 80 1 P Wms 245.

So also it is now clearly settled, tho formerly held otherwise that an infant in ventre sa mere, is capable of taking by descent. 1 P Wms 946-7.

So also such an infant may take by devise, tho formerly held otherwise. Feam Cont Rem 452. When a devise is made to an unborn child it descends to the heir at law, until the birth of the devise & then rests in him 2 Mod 9. 1 Lev 135. 1 Bro & L 386. 2 P Wms 28. East 319.

So also a child in ventre sa mere is entitled to distributive share under the stat of distributions. 1 P Wms 446. Sta 114. Burnard 296. The consequence of this rule would be, that if a distribution should be made before the birth of such child, in which he was not considered, the distribution would be set aside on his birth & a new one made so if one share should be reserved and there should be no more.

So too a posthumous child may take under a term created for the purpose of giving portions for younger children, altho it be expressed for children which shall be living at the death of the father. Bro Ch 38. 1 P Wms 246. 342. The rule is the same in a bond given for the same purpose 2 Free L 23. —

Parent & Child

An infant in utero sa mere, may have an injunction to stay
past. In such case the injⁿ is usually prayed for by his father, or
guardian 2 Ves 710-11, 12 & 117. R. & 57

He may also have a testamentary guardian appointed him, but he
can have none unless appointed by testament! 1 Bla 130, 462.

It was formerly held, that an unborn infant could not take by
a devise in praesenti i.e. unless it were an executory devise or there
were trustees created to preserve contingent remainders. But it abso-
lutely agreed that if the estate was given to such infant presently
in future, viz. when he should be born, the devise would be good. 1
224-4. Moor 637. Carth 314. 1 Sid 153. 1 Lev 135;

But the latest decision at common law, is, that such an infant may take
by a direct devise, per verba et praesenti, 1 Bro 247. 2 Barn 424. 3 Bro 124.
This decision, however, was in reversal of judgment by the house of Lords
against the opinion of all the Judges. And the opinion of the Judges
here so strongly against the decision, a stat in the reign of 7 Wm 3, was
passed enabling an infant in utero sa mere, to take in the same
manner as hence born 4 Bar 312. 2 Bla 164.

It is probable in Con. that such an infant might take by deed, or as
no living of seisin is necessary, he may as well take by deed as devise.
In Eng. when the eldest son is the only heir if the ancestor dies leaving
a daughter & his wife en ventre d'un son, the inheritance descends
to the daughter until the birth of the son, & then vests in him
5 Term 661. But if payment be made, with a condition

Parent & Child

71

anest. on the performance of which the state is to resort. & he. can die leaving a daughter & no wife & no son. & upon the birth of the son, having to perform the condition which is in the estate in her, she shall not be debarred of it on the birth of the son, but shall hold it against him. 1294. Ho. 3.

What Offices an Infant may hold.

An infant in Eng. can infant. may hold any ministerial office, but can hold no judicial office. Co. Lit. 36. a. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

An infant in Eng. may in Eng. be a mayor, where the office is merely ministerial. 36. a. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

As an infant in Eng. may execute the office of an Executor, a ministerial office in Eng. may be granted, in remainder as well as in possession, if the infant be incapable of receiving it, he may execute the office. But a judicial office, can never be granted in remainder, for it cannot be executed by Depp. 11. Co. Lit. 36. a. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

An infant cannot hold the office of an atty. & the reason given is that he cannot be sworn. 3. a. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

As an infant cannot be a juror, for he cannot be sworn & the office is in some measure a judicial one. Ho. 3. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

It seems to be a general rule that an infant, can hold no office which cannot be executed by Depp. Co. Lit. 36. a. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

In Con an infant can hold no judicial office. & I doubt whether he can 55

any ministerial one unless it be that of Executor, & as to that, I do not know of no office in Con that can be executed by a Depp. except that of a Sheriff & a Sheriff in Con must be sworn & give bonds.

An infant in Eng. may be a jailor & as such liable to an action & dect for an escape. 3. Ho. 2. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

If one wrongfully enters on the land of an infant, the infant may recover him as a trespasser, & sue him in his own action & account, or he may treat him as wrong doer, & sue him in his own action & account, or he may

An infant before is liable for waste, whether voluntary or permissive. Co. Lit. 36. a. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Parent & Child
Conditions.

An infant is not in general bound by a condition, the breach of which would subject him to a penalty, though he, however, must be understood a voluntarily distinct from the loss of the estate holden on condition, for the estate itself be dependant on the condition, the infant is bound by it. Coit 246. b. 3 Inst 129. 1 Vent 400. East 493. 2 Ld 21. 1 Vent 199. 2 W 333. 344. 360. All conditions may be divided into two kinds, Express & implied. It is regularly true, that by express conditions an infant is bound. 2 W 360. Ch 4 246. c. Conditions implied are of two kinds, conditions implied by common law & conditions impliedly stat law. Conditions implied by common law are also of two kinds, 1st conditions of condition & skill & diligence, such are all conditions, which grow out of the tenure of offices, there being a condition always implied, that the grantee shall execute the office with skill & fidelity. Conditions of this kind are binding upon infants 8 Co 44. b. Coit 253. Croas 546.

According to the current limitations a Part Limitations necessary against
inventions is their novelty as properly saved & 21. Dec 513.
It is also laid down as a rule that a patent in this matter, acting for
the benefit of an inventor, do not run within the time limited by that the

infant is bound by the stat. altho infants are expressly excepted in the stat. This I suppose, contemplates a case where the Person, to whom a debt which belonged to his testator or intestate, & which the infant would be entitled to under the stat of distributions, & 44 Geo. 3. c. 11.

The last rule I suppose will amount to this, that, altho the rights of the infant are saved by a promise in the stat. yet if there be any person capable of suing in his behalf, the stat of limitations will run against him.

If an infant elect to consider a trustee or lessee as a trustee, & sue him in account, he must bring the suit within the time limited in the stat. for he is bound by the limitation 1 Eq. Ca. 504. 1 W. 4. 574.

If a legacy be given an infant, it will carry interest after one year altho no demand be made of the Ex^r 1 P. 164. 1 W. 4. 574. 2 Sal. 415.

How an Infant must appear.

When an infant brings a suit, he must always appear by guardian or prochein ami. 2 R. 25. 50.

Common law an infant pl^y could only appear by guardian, but now by stat in Eng. an infant pl^y may sometimes appear by prochein ami. 3 Tra 909.

The reason of this stat is adopted in Con. & infants are allowed to sue by prochein ami.

There are only four cases where an infant can appear by prochein ami. 1st Where he sues his guardian. 2^d Where the guardian, tho he consents to the suit, will not sue for the infant, & will not suffer him to sue in his (the guardian's) name, but the guardian do not consent to the suit, the infant cannot sue, for the guardian, it is said by 1 W. 4. may come in at any time & give the suit. Cro. Jac. 640. 1 W. 4. 499. 592.

3^d Where he is out of the reach of his guardian, or as it is expressed, is out of the reach of him. 4th Where he has no guardian Cro. Jac. 640. Sal. 295. 5. 1 W. 4. 499. If an action be brought by husband & wife, & the wife is an infant, they may both appear by atty. But the action be brought against them, she must appear by her guardian. 1 Mol. 298. 1 Vent. 185. 12 Feb 1778. 3 Bac 157.

When an infant sues by guardian or prochein ami, the guardian or prochein ami is liable for the cost-frames 1 W. 4. 574. 1 Eq. Ca. 112. -

79 And it said must give security for the cost. Dury 446.

It has also been said that the infant is liable for cost. 28 How 99, 200
28, 77, 150, 180, 185.

But this is denied by the 2d Ch. King. & the weight of authority seems to be
that the infant is not liable. Sta 704, 217, Cro El 38, 110, 114, 116, 216,
218, 219, 220.

In Con, however, it seems to have been the opinion that Ca^m must first
inter against the infant, before the guardian will be liable.
When a guardian appears for an infant, he should regularly appear
by admission of the Ct. Sta 704, 217, 232.

And in Eng, the admission of the guardian is generally entered of record,
Sta 804, 217, 232.

But in Con a tacit admission of the guardian by the Ct. has been consider-
ed, as sufficient. 140 416.

It is laid down as a rule & seems not to be controverted, that any person may ap-
pear a bill in Ch in behalf of an infant, as for his own use, but must
obtain the infant's consent. 140 376, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

An infant not is liable for cost as an adult. 200 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

An infant when sued can never appear by prochein ami, but must always
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pro rata, who will be his guardian ad litem. In Con the usual prac-
tice has been to appoint his atty. But thro an infant must appear

by guardian it is not to be understood, that he may not have an
atty. to manage the suit for him, the sole object of appointing a gu-
ardian, is that he may sign the plea, for that cannot be signed by atty.

It is a general rule that a Ct cannot appoint a guardian ad litem,
where the infant had one before, unless such guardian be out of the

way & cannot appear to defend the infant. 150 424, 300 154.

The usual practice in Con is to insert a objection in the writ to the
officer to summon the guardian, but if he be not summoned, & is

no cause of abatement, but time will be given to notify him of the suit.

If an infant be sued with others, & it appears by an affidavit &c. ²⁸
entire judgment given against them, the judgment is erroneous. In Eng the
whole judgment is erroneous, & will be reversed in toto. Cro. Jac. 244, 110 & 116
2 Jac 148, 198. 32 Gray 455.

But if the different parts of the judgment be separate or several as if the assizes should be separate, now they may be reversed by the jury. The judgment is
erroneous as respects the infant only. &c. and as to the adults &c. 189, 8 & 9
4 Burr 1121. 5 Co 58.

In Con it has been decided that if an entire judgment be rendered against an
infant & an adult it is erroneous only as to the infant. 110.

This however, was a case of tort, where if the whole of the damages had been
levied upon one, there could have been no contribution, compelled, but
if it had been a case of contract, it is strict & absolute: where then it would not
have been considered as erroneous in toto.

In Eng. if a fine be levied by an infant & an adult, it may be reversed as
to the infant, & stand good against the adult.

Legitimacy.

A legitimate child is one born during lawful wedlock or within a ^{competent} ~~competent~~
time after marriage. that is none other can be legitimate, but a son child
born in lawful wedlock is not legitimate. Cro. Jac. 244, 110 & 116 482
492. Cro. Jac. 244.

An illegitimate child is said to be one which is born & begotten out of
lawful wedlock 1 Bla 454.

But this definition, I apprehend is not correct, for it is said the husband
before marriage & before the birth of the child to his wife dies.
such child would undoubtedly be legitimate. An illegitimate ^{husband}
may be said to be one, which is begotten out of lawful wedlock & within
a competent time after marriage.

Where the child is born in lawful wedlock the presumption is that
the child is legitimate & formerly the presumption would be rebutted only
by showing its impossibility. Cro. Jac. 244, 110 & 116 482.

This could be done only in two ways, by showing an impossibility.

of access, or by showing a total impotency in the husband in 12. 3. 1826.
The impossibility of access could be proved only, by showing that the husband
was ultra quatuor menses, i.e. without the reason and way 3046; 11 Bac 174; Sol 123.3.
95.2. 1101 358. Exp 483. Coro 573.

According to some, the age of impotency was under eight, according to others
under fourteen. It was always sufficient to prove the husband within
the age of impotency, to render the child illegitimate 1101 357. Cor 12
244. n. 11 Bac 316.

So too according to the old rule, altho the husband should have been absent
from the realm ever so long, yet if he should return during gestation
tho it were but one day before the birth of the child, which was then
pregnant 1101 353. 2 Bac 124. 484.

But the old rule has been by degrees abolished. It was first determined
that non access might be proved by other evidence than ^{that} the husband
was out of the realm. 344. 1101 275. l. 25. 1101 484. 2 Bac 425. Exp 484.

So also it has been decided that impotency might be proved by other
evidence than infanc y, so by proving the husband's habit of body, &
this is a ques for the jury to determine, 2 Bac 446. Exp 486.

The proof, however, must amount to a moral impotency, & the husband
being the father, the rule has been relaxed still farther, for it is now
established that other evidence than that of non access & impotency,
may be given to prove the illegitimacy, & by showing that the wife
cohabited with another man, & that he was the reputed father of the
child. 4 Deion 358. Exp 484. 97. 1101 330.

On Con I believe the rule of evidence is, in this respect, the same as it
now is in Eng.

Where the marriage was null ab initio, the issue are bastards, this
is only, when there was a legal disatality existing at the time of the
marriage. So where there has been a total divorce from the for-
mer, this is where there was a canonical disatality existing at the
time of the marriage. & this only can be done during the life of the
parents 1101 455. c. Cor 1235. 11 Bac 316. 1101 357. l. 2. 2 Bac 471.

But by the stat. Con. & analogy & affinity render the marriage absolutely void, & if coene the issue are bastards, without a divorce. If a child be begotten & born after a partial divorce, he is deemed illegitimate, unless it be actually proved, or it will be presumed that they conform to the sentence of the law. See 123. 1 Mol 334. 76. 42.

But after a voluntary separation between husband & wife, if a child be begotten & born, it is deemed legitimate, unless the want of access be proved. 44. 112. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

When the ques of legitimacy or illegitimacy depends on the ques of access, the wife is, not a competent witness to prove the want of access, but if it depends on the ques of her own incontinency, she is a competent witness. See 112. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

According to the civil & canon law a subsequent marriage, would legitimate the issue born before marriage, but by the Eng & Con law it is otherwise. 1 Mol 344. 1 Bla 454.

The time is not precisely settled in which a child must be born after the death of the husband to be deemed legitimate. It is laid down by Coke that the utmost time allowed is nine calendar, or solar, months. See 112. 136.

But this rule is not correct, nine months, it is true, is the usual time allowed, but it is not the ultimate time. 44. 112. 136. But whatever the usual time of gestation may be, that time may be hastened or prolonged. Coke however, does not confine it to nine calendar months strictly speaking, for he considers the nine months as equivalent to forty weeks. 44. 112. 136. If the birth exceeds the nine calendar months, or forty weeks, the presumption is that the child is illegitimate, & will be so considered unless it can be shown that the birth has been retarded. It is not settled, however, that nine months is the usual time of gestation, it is said by some that nine months & ten days is the usual time. 44. 112. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 72

death of the husband, in these cases also, I presume, there was proof in the former one, that the birth was untimely, 1 Bac 312.

But when the child was born eleven months after death, deemed illegitimate, all. 114, Exp. 478.

Questions, magistrates, have sometimes arisen, when the wife has married immediately on the death of the first husband, it is difficult to determine to which husband the child belongs. The rule in this case, is that if the child be born at such a time, that according to the usual course of gestation it may belong to either, the child on arriving at full age shall have his election, to which husband he will belong. Co. lit. 8.

61 When the child is born nine months or ten days after the death of the first husband, & the wife has married immediately after his death, the child may choose his father. 1 Mol 357, 1 Bac 312, Co. lit. 8.

If the child be born after the usual time, he must belong to the second husband; if before the usual time he must belong to the first. But not the election, the child has his election. Co. lit. 12. 3. —

I apprehend, however, that the period limited by Coke, viz. nine calendar or solar months, is to be considered the usual time of gestation, & they are who has collected all the authorities on this subject, draw the same conclusion. It is also corroborated by the opinion of a celebrated physician & surgeon, Dr. Hunter.

No present disputes of this kind, where it might be uncertain to which of the husbands the child belonged; the civil law ordained, that no widow should marry within a year after the death of her husband, & so was anciently the law in Eng. Co. lit. 8.

And even now in Eng. if the wife, on the death of her husband, be suspected to be with child, the heir may have a writ de ventre inspiciendo, to examine whether she be with child or not, or suspected to be so she may, she may be confined in a castle until the birth of the child, or until it is demonstrated that she is pregnant. But if she has taken a second husband, she is not to be imprisoned, but to be examined every day until her delivery. 1 Bac 312, 1 Mol 357.

Parent & Child.

80

It is a general rule that parents shall not be allowed to have ^{the} ~~their~~ ^{issue} ~~issue~~, but this rule holds only where the issue was born after marriage for either parent may give evidence that the child was born before marriage & general declarations by them to that effect or an answer in Oby an good evidence of the fact. Cor 541. Ex 486.

It is laid down as a general rule that no one is to be bastardized after his death, but this must be taken with a qualification. vide post 62. An illegitimate may acquire a name by reputation, & may purchase by that name, but that name must be acquired by reputation, for he can have none immediately on his birth. 1 Sid 194. Co Lit 562 a. 1 Cor 542. 56664 Cor 570. 1044 410. C Co 65 a

He cannot take under the description of issue of the father as Cor 570. It is said in Moor. that an illegitimate child may take by the description of children either from the father or mother where the devise is in these words, "to all my children." Moor 10.

But this seems not to be law & at least it is not by Godolphin ^{Ch} not to law. Godol 280. This is a mistake, it is said both in Moor & Godol that such words in a grant would give the illegit & nothing but a devise is made to a devise. If a devise be to A. the son of B. & C. is an illegitimate he may take by such description if he be the reputed son of C. C Co 65. 2 Rol 434 1 Sid 194. Co Lit 36.

It is said that a contingent remainder, or other contingent estate, cannot be limited to a man's unborn illegitimate son or issue; for the man may have an illegitimate son, yet it is uncertain whether he will acquire that reputation, & until that time the remainder cannot vest, so that the contingency would be too remote & improbable. Cor 570. 1 P Wms 529. 2 Rol 437. C Co 65. 1 Bla 170. Co Lit 56. But it is said if the remainder be limited to the eldest son of a woman whether legitimate or illegitimate & she hath issue a bastard, he will take the remainder, because he acquires the denomination of issue, by being born of her body. 1 Ky 65. Co Lit, 36, no. 1 Bac 309. no.

Parent & Child.

Both these rules are questioned by Argyres in his note on Co. 113.
 An illegitimate child can be heir to no one, nor can he be ancestor
 to any one except his own children 1 Bla 454. Decis in Con for here not
 usual children by the same mother are heirs to each other 2 Blk
 138. If a child be born before marriage & afterwards the parents
 intermarry & have issue another son, the first is called bastard
eigne & the second mulier puidne. In such case the father
 dies & the bastard eigne enters upon the inheritance & continues
 in possession until his death his issue shall have it ^{in exclusion}
 of the mulier puidne 7 Co 49. Jack 268. Co. lit. 93 a 245; & Co. 101. -
 The rule ante. that the issue shall not be bastardised after their
 death is said to apply only to the case of bastard eigne & mulier
puidne. Exp 486. Dal 120. 3 Lev 410.

But in order to exclude the mulier, the possession of the bastard
eigne must have been uninterrupted, & also there must have been
 a descent east. Whit 259. 1 Bac 316.

The maxim that an illegitimate is nullius filius, is not so
 extensive in Con as in Eng. So far as it respects inheritance it
 probably does hold, but I apprehend it is confined solely to that.
 Therefore an illegitimate child in Con cannot inherit to his
 mother, for it has been decided by the C. C. that the mother can
 not inherit to her bastard child, tho' the Ct were divided in the quest.
 In Con the settlement of a bastard child is in the place where
 the mother is settled. But in Eng. the parish where he is born is
 the place of his settlement Dal 427. 1 Bla 454. Doeg 7. 2 Went 42. 3 Ken
 & however, there has been a very fraud practice, of transferring the
 mother into another parish, in order to throw the child upon that par-
 ish, or if the mother voluntarily goes into another parish for the pur-
 pose of changing that parish with maintenance of the child
 & is there delivered, the place of the child's settlement will be
 in the parish to which the mother belonged 1 Bla 454. Dal 121.

82

Parent & Child.
Of the liability of parents to support their
Bastard Children.

Both in Eng & in Con the father & mother are equally liable & bound to support a bastard child. 1 Bla 458.

According to the practice in Con. the damages recovered against the reputed father, are for the child's support until he is four years old. *Whit 2 Ct. 4.* For the purpose of proving the father, the oath of the mother is allowed both in Eng & Con. The mode of proceeding in this State is this, the mother makes oath before a Justice of Peace, that such person is the father of her child, on so issues a warrant to apprehend the person charged & binds him over to the County Ct. But this Stat does not authorize the justice to take security for his appearance, obiding the final judgment of the County Ct. but merely to answer the charge. *Whit 26 7.* (This bond was holden up & *Whit 20* & agreeable to constant practice.)

The person charged is not entitled to notice, as in civil cases, but must be brought before justice. The oath of the mother must be made before the birth of the child or she will have no remedy. This is not expressly declared, but such is the construction of the Stat. In Eng however it is otherwise. 1 Bla 458.

The oath of the woman is prima facie evidence of the fact, tho' not absolutely conclusive. In this State the damages recovered against the father are levied quarterly, & if the child dies the remaining payments need not be made. But if the child be sick, so that extraordinary expenses are incurred for its support, the Ct. will allow further damages & annex them to the quarterly payments. The Stat also requires that the mother should be put to the discovery of the truth at the time of her trial, the practice however, has been not to put her to the discovery at that time & yet the father was considered liable, but it has lately been decided by the superior Ct. Ct. that the mother has no remedy unless she is put to the discovery at the time of her trial. *Whit 10 7.* But in a prosecution by the Crown this is not necessary. *1 Dep. Ca 278.*

Parent & Child.

The form of process is criminal, & so is the judgment, for the father is required to give security for the payment of the damages assessed. So on a prosecution by the town, or at the request on a prosecution by the mother, he is compelled to give security, to save the town harmless but this cannot be required of the mother.

The stat requires that writs against Bail be brought within one year from the time of rendering final judgment against the principal, but this does not extend to the case of bonds given as security for the payment of damages assessed in a prosecution against the father of a bastard child. *1 Bla 467.*

If the mother do not prosecute at all, the select men may, if she has commenced a prosecution & discontinue it, the select men may enter & prosecute the same complaint. But when the select men prosecute, it is no objection, that the mother did not charge the putative father on oath. If the father do not give security accordingly that he may be imprisoned, & cannot take the benefit of the poor prisoners act. The mode of proceeding in Eng is generally the same as in Con. *1 Bla 458.* It is a rule in Eng that if the mother swears on a charge before a Justice of the peace, is good evidence after her death to support an order of affiliation, or to charge the reputed father & Dues of 50s. If the child be not born before the rising of the W to which the father is bound, the prosecution will be continued or he will be ordered to give bonds for his appearance at the next Ct. If the mother die, or marries ^{the} birth of the child he is discharged. *1 Bla 458.*

This prosecution is so far of a criminal nature that it cannot be appealed from the County to Sup Ct. Such was the rule formerly, afterw^{ts} it was held otherwise, but it is now settled that no appeal will lie. It may be questioned whether the mother can be compelled to give evidence against the reputed father in a prosecution of the town & recover. She may be compelled. *1 Day, 24 in Ct 2 Th.* In Eng the rule is clearly settled that she is not a witness one month after delivery. *1 Bla 458.*

Parent & Child.

89

In this state there have been some doubts entertained upon the subject, but I apprehend she is compellable.

The putative father has no right to the custody of the child. See Rep. 178. 2 Str. 468 335.

See on trials on complaints of this kind more formerly by the C. J. but 65 it is now settled that the party may be tried by the jury if he pleases, the form of prosecution is criminal, & positions are admitted.

Of the liability of parents & children to support each other.

By our law parents & grandparents, & able, are liable to support their children, & grand children, who are unable to support themselves, & so vice versa, Stat. 132.

The first part of this law, clearly obtains in Eng. but it is questionable whether grand children are compellable to support their grand parents as the stat does not expressly declare it, by the latter authority, however, it seems they are not 11 Mod 454. or 448. Sta 196.

On con the maternal obligation is enforced by application to the C. J. This application is by memorial or petition, & may be made by any of the relations or by the select men, & according to the practice it is said, the pauper, or any one of his neighbors, may make the application, on this memorial the C. J. call all the parties before them, & apportion the expence according to the ability of each, without any regard to the property they have received from such indigent person, the C. J. orders security to be given for the sum required for the support of the pauper, to be paid by quarterly payments, & if security be given the C. J. issues quarterly orders; but if the persons liable neglect or refuse to give security, then the C. J. will issue for the quarterly payments, the C. J. issue in the name of the memorialist, so he comes a trustee for the pauper. The proceedings are in the last ^{for parents} for the pauper lives, & tho the persons liable live in another county, Grand parents, or grand children, are not liable when there are parents or children of sufficient ability, but if they should be able to maintain only a part of the support, I presume the grand parents or grand chi-

Parent & Child.

children would be liable for the residue of a man married a woman having children, he is bound to support such children whether the mother was able to support them or not, but his liability continues only during cohabitation. In Eng however, he is not liable whether the wife before marriage was of ability to support them or not. 4 D Kay 145 & 4 Durnf 114. 2 Hume 291. The rule, I apprehend, ought in justice to be, that the husband shall be liable if the wife men of sufficient ability before marriage, not otherwise, & so the rule is laid down by Blackstone, but the later authorities musty, from 1 Bla 448. or 104. A son in law is not obliged to support the parents of the wife either in Eng or in Con. 1 Stra 190. 2 Bul 344. If the pauper has both parents & children able to support him, it is unsettled whether the parents or the children shall furnish the support, or whether both shall contribute, but I apprehend the children would be first liable.

Protection.

The parent is bound to support, protect & educate his children; and is incident to this obligation of protection he justly an assaull & battery in defence of his child? 1 Ha 131.

When a man's son was beaten by another boy, & the father sawing the quarrel, followed the other boy & beat him so outrageously, that he died of the beating, it was adjudged only manslaughter. 6 Co 124b. 1 Ha 133. 1 Bla 450. or 476.

So also a father may maintain & uphold his child, in his law suits without being guilty of maintenance 1 Bla 450.

Of the parents liability for the torts & contracts of the child?

Parents are in some cases liable for the torts committed by their children. & the rule is, that they are liable to the same degree that a master is for the torts of his servant, for the parent is not liable as a parent but as a master, children being considered as servants to their parents until they are of full age, 1 Bla 430.

Parent & Child.

86

It is a general rule that if the child in performing the business of the parent does an injury which arises out of the performance of that business, the parent is liable. In some cases the child is also liable. But if the act on which occasions the injury being unconnected with the performance of the parents business, the parent is not liable. It has once been decided in this state that where a child was employed by his parent in burning brush & the wind suddenly shifting, blew the fire onto a neighboring house & did considerable damage, that neither the parent nor child was liable. This decision seems to establish the principle that where one in doing a lawful act occasions an injury to another, which he can avoid, he is not liable. This principle, however is opposed to the English decisions 2 Bla Rep 892. 1 Tont 86.

The parent is sometimes liable for the contracts of the child tho not for necessities. This is in four ways. 1st When the child is freely employed by the parent. 2nd When the parent gives him a general licence to trade for him. 3rd When he purchases goods which come to the use of the parent. 4th According to the construction of the stat. of Con. where a general licence is given by the parent for the infant to trade for himself. The last however is not a rule of common law. The parent in the three first cases is bound as master & not as parent 13 In 450. A parent or guardian is bound by the infants indenture if made wth his consent 2 Mass 466. 482

There is also another case when the parent in Con. is bound which does come within either of the foregoing rules. If those contracts or acts of the infant are of such a nature that a payment by the father affords evidence of his approbation of the contract, he does also have such acts he shall be bound by future contracts of the infant of the same nature. These contracts must be such as are not contra bonos mores.

When a parent is liable for the debt or contract of the child, the action is put as if the tort was committed or the contract made by the parent himself but if peremptory, it would not vitiate the declaration to state that the infant was the agent.

Parent & Child Education.

The parent is also bound to educate his children. In Eng it is said that the parent is bound to give his children a suitable education, but the law has pointed out no mode of compelling him. The stat, however, authorizes the finding out of poor children, as apprentices, & prohibits its parents from sending their children of the kingdom to be instructed in the popish religion, or to prevent their good education at home 1 Bla 450.

Ch In Con the select men with the advice of the next justice of the peace may bind out children not properly educated, males till 21, & females till they are 18, in order that they may have a suitable education 21 Ch. By the same stat parents who neglect to educate their children are liable to a fine of five dollars & thirty pence. By this stat, it is made the duty of all parents to teach their children to read the english language, not to know the law against capital offences, but if they are not able to do this, then to learn them some short orthodox catechism, what an orthodox catechism may be a matter of uncertainty. The parent is entitled to no part of the infants estate except what he acquires by his own industry, & that belongs to the father, as he is entitled to all his earnings 1 Bla 452-3. -

Of the parents remedy for injuries done his Child.

Strictly speaking the father can maintain no action for an injury done to his child, but for a damage accruing himself in consequence of an injury done to the child he may maintain an action 3 Ray 554, 9 Co 113. Where the parent would recover for any offence he has been put to, he must that offence in the declaration 1 Bla 453. Actions of this kind have generally been inform. trespass at ass. is, but the proper action is trespass on the case, see side 5 Wood 415. So also the parent may have an action for quod servitium amisit for detaching his daughter, the nominal ground of these actions & originally the real ground is the loss of service only 1 Quin 166, 2 P 1045, 1 Vent 352, 3 Ray 159, 5 Wils 18. -

Parents & Child

It makes no difference of what age the daughter may be, where she is the servant of her father. 2 Burnf 166.

It is said by Cr 1645 that the daughter must be living with the father. But this is not true, nor is the proposition negated by the which he cites. It is also said by Cr that the daughter must be under age, but this is also a mistake.

It is said ~~that~~ ^{for} in Eng^l Con, that the daughter in these cases is a good witness. 3 Wils. R. 100, 472.

This action will lie not only in favour of a parent, but also in favour of any one standing in ~~the place of~~ ^{the place of} parent. 2 Burnf 4.

When the entry of the parent is unlawful, the proper action is trespass, ~~is~~ ^{is} ~~claiming~~ ^{claiming}, & the injury arising from the detour of the daughter merely consequential, & no way necessary to the support of the action. But he may waive the trespass & bring trespass on the case. 2 Burnf 107, Cr 1645.

If the entry was not illegal, the proper remedy is by assumpsit on the case, & trespass is ~~claiming~~ ^{claiming} does not lie. In Eng^l, when the action is trespass, the Def^t cannot give a licence to enter in evidence under the general issue but must plead it. 2 Burnf 108. It is the same in Com^l. Mr. Bore has expressed a doubt whether the action would lie without alleging any loss of service or expense merely for the disgrace of the family. We know of no principle of law which would entitle the father to a recovery in such case; tho' it is true the injury to the parents feelings, the disgrace of the family are made the principle ground of the damages. & where the daughter is a good character no disgrace is lost upon the family, no damages will be recovered. The parent may also have an action for enticing away his child, or he may for enticing away his servant. It is not always, however, whether the action will lie in this case except for the loss of service. At common law during the juvenile tenures, an action would lie for enticing away a person or son & heir, because by that means he lost the reitor maritagii.

but it would lie in no other case. It is said by Blackstone & Glanville that the action will lie for the loss & comfort of the child, so it is, but the weight of authority is against it. 10 Co 117. 2. 1. 13. 41. 3 Co 38. 1. 3 Com. 136. 3 Bla 140. I am inclined to believe that the Ct. would in this state, if they would not now in Eng. support the action.

Correction of Children.

The parent has a right to correct his child moderately, but if he exceeds the bounds of moderation & appears to be influenced by malice, the child may have an action against him for damages, by his prochein ami 1 Bla 478. 1 Haw 136. 121-2. But as the authority of the parent over these children is necessarily discretionary, he is not punishable for a mere erroneous judgment with respect to the correction of the child. There must therefore be immoderate correction, considering the nature of the case & malice, in order to subject the parent to damages. The malice is to be inferred from the nature & circumstances of the fact, & it will always be inferred when the child is corrected for that which no rational person would think worthy of punishment. The law is the same as to master & servant 4 Bla 484. Sup^a 21.

Any wickedness of motive constitutes malice whether there be any ill will or not.

The parent is natural guardian of the child & his estate, but he must account for the profits of the latter. In case of danger to the child's estate the guardian, whether parent or other person may be compelled in Chy to account before the child attains full age. In similar cases Chy may appoint another guardian in exclusion of the parent or may require the parent to give bonds, to secure the child's estate. In case of necessity, it will bind him 2 Mod 177. 1 P Wms 73. Co Litt 8m. Nov 434. Cas. Th 385. 5 Mod 223. No other person, however, can be appointed guardian while the father is living, unless he is displaced. Displacing a parent's guardian does not take away the parent's right to the child's person. The parent has no right to expense any part of the child's board in his maintenance or education, tho any other guardian has. 2 Vent 253. 2 W 352. 1 Rem 255.

Parent & Child. Guardian &c

But for any thing beyond necessary maintenance, protection & education, the parent may also charge the child's estate, provided the purpose be laudable, & for the child's benefit, & the means direct & proper for extraordinary education, an expensive trade &c. *1 P. W. 399, 489.*

The contradictory positions in the books on this subject all turn entirely upon the different circumstances of the father.

The power lodged with the Chancellor in Eng. over the conduct of the guardian is in Con. vested in the Ct of Probate; what this power is, see *1 P. W. 703.*

The guardian must pay interest for the money of his ward, unless he can prove that interest could not be procured for it. If any part of the ward's property in the hands of the guardian be lost, by accident or misfortune & no fault or imprudence is chargeable on the guardian, the ward must bear the loss.

When the Ct of Probate appoints a guardian for a child under the age of 14 years in a guardian, the guardian thus appointed continues of course unless the child after attaining that age, chooses one whom the judge approves. And if a child, by law capable of choosing, refuse; Probate W. R. directs, must appoint without his choosing.

Guardian in socage continues till the child is 14 years old & the heir may oust the guardian & call him to account for the rents & profits. *2 Bla. 91. Co. Lit. 44. 9. 2 R. 40. 1 W. 449.*

The guardian must be such an one to whom the inheritance goes by no possibility of descent, as the uncle by the mother's side when the estate descended from the father. This law tho' highly & flatter'd by *Blackstone* is founded on the barbarous idea that a grandfather murders his nephews, in order to inherit their estate, he offering that to commit the custody of an infant to him that is next in succession is *quasi agnum committere sepe* *decurandum*. *Co. Lit. 87. 1 Bla. 484.* Guardian in socage may bring an action in his own name for a trespass on the ward's estate, in this particular he differs from other guardians. *2 R. 41. Co. Lit. 98. 2 P. W. 12. 1 Day 13.*

When there is a guardian in socage it is also necessary, if the ward has personal estate, to appoint another guardian, tho' the

Guardian of Wards.

94

same person, who is guardian in socage, may be appointed to the guardianship. Testamentary guardians cannot lease the ward's estate. They may be bound by their wards, to their good behavior, if they attempt an improper exercise of their authority. 2 P Wms 111. Testamentary guardians are those appointed by deed or will of the father, these exercise guardianship in socage, & retain their authority till the ward is of full age. 2 Wils 129, 138. 1 P Wms 703. Raugh 179-80.

The power of appointing testamentary guardians in Eng is by stat 12 Car 2 but this statute extends only to fathers. 3 Atk 519. 1 Bla 489.

Fathers having authority at common law, to dispose of the persons of their children, this guardian is liable to the same restriction by assent in socage & indeed as all other guardians.

Guardian in chivalry is now antiquated. 1 P Wms 64.

There are also guardians, or curators, which are of course appointed by the mother till the infant attains the age of 14 years. 1 Bla 488.

Coit 88. Nor 538. 3 Co 38. c And in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, & to provide for his maintenance & education. 2 P Wms 96. 2 Ld 113. In Con testamentary guardians are unknown, the ordinary to the usage here agrees may bind out his ward as an apprentice.

Guardians in Eng are appointed by the ordinary, or Chancery. Guardians appointed by either of these offices are always required to give bonds for the security of the ward's estate & they continue until the infant attains the age of 14. 4 Ree 470.

A minor having obtained the legal age for choosing a guardian has not the absolute power of choosing whom he pleases, but his choice must be ratified before it has any effect, in Eng by the Chancellor or ordinary in Con by the Society of Brokers; & the choice of the infant is rejected it cannot control. In Eng if the father dies the mother is natural guardian & takes children till 16. If she dies & he is not out of the world may be appointed his guardian in the case of males but not in the case of females. In Con she is natural guardian to her female children under 12 y. 2 Root 323.

95

The guardianship of mothers is unknown to the common law but by the stat. 14th the mother has now the guardianship of the males, there is no such stat in Con the Ct of Probate appoint guardians in both cases, yet both in Eng & Con males & females may at the age of 14 & females at the age of 12 in Con, choose a guardian for themselves tho the mother be living, But tho in Eng the mother is on the fathers death, natural guardian to her children under the age of 14, she is not of course guardian in socage, but this will depend on her situation with respect to the socage lands. What if the lands are, by no possibility, descended to her, she may be guardian in socage.

In Con it is the duty of the Ct of Probate to appoint guardian for infants who have no parents & are under the age for choosing for themselves.

In Eng, an inf mortgage may on payment of the money loaned recover the estate to the mortgagor, 3 Burr 1799. Black 595. 1 Bla 499.

In Con, this power is, by stat, placed in the hands of the guardian, the guardian here has also the power to make partitions of the land holden by the ward in common, joint &c. under the direction of the Probate. If a creditor of a minor, in order to obtain immediate payment, agree to accept of a less sum than is due, in satisfaction of the whole demand, the minor, not the guardian is entitled to the benefit of such composition. A guardian is considered as a trustee in Chy. And, whoever takes possession of an infants estate may be charged as guardian, or trustee. 2 We. 342. 255. 1 is 436. 1 Atk 489.

A guardian having personal property of an infant is obliged to pay all debts.

75 Incumbrances charged upon the minors estate, act of such property.

This rule is established to keep the infant from any accident which might happen to his property if it were put out to the usual property employed in the payment of the infants debts. The guardian has no power to invest the minors money in lands, but if he does & takes deeds in the minors name, still the father on arriving at full age, at election, accept the lands or redeem the money. In the latter case however being compellable to recover the lands to the use of the minor in case of such a purchase by fraud, the ward dies.

Guardian of Ward

94

having made no objection, his ~~or~~ is entitled to the money & his ~~he~~ cannot claim the land 14es 403. 435-6.

It is a general rule that the guar in accounting with the ward must pay principle & int^t; nor is he in any way obliged to pay more unless the ward's money was directed to be laid out in a particular manner, & instead of employing it according to direction, the guardian had used it some other way to greater advantage, as in a going off trade to himself. In this case as the minor's money is exposed hazard, he may elect when he comes of age, to take the interest, or such a share of the profits as Chy may direct. 12es 629.

Guardians in Con. are usually not to account by an action quacount. In Eng by a bill in Chy.

For such losses ~~to~~ injuries to the ward's property as could not be avoided by common prudence the guar is not liable.

If a guar unavoidably suffers money which is depreciating before it is in his hands, he is not liable for any thing more than the principle & interest at the time when the ward comes of age. (See also he liable to interest in such cases) & in case the guardian from motives of prudence to the ward converts the money into land, Chy will grant an injunction against a suit instituted for the money.

The guar, except he is also a parent, is allowed the expenses of maintenance & education of the child, unless the expenses are very unnecessary & extraordinary. But in general the guar has a discretionary power, to educate the ward as he thinks proper.

Guardians in Con. m^k, & those may account with the Ct of Probate as with Chy in Eng. But the usual mode in Con in case of a dispute is to institute an action of account at law as in other cases ^{see note 529} in Eng. 75. A guar may also be sued in this action, but a Chy has a more extensive power in compelling the production of papers, & obliging the guar to disclose the whole history of his guardianship upon oath, it has been seen the practice to resort to Chy only in these cases. The charge to the maintenance of minors, Chy in Eng exercises a jurisdiction which has never been claimed in Ct of Probate in Con. 12es 424. 111. 562.

Parent & Child Settlement.

A foreigner can never gain a settlement in Eng^d by his own act but if he has children the place of their birth is the place of their settlement. So also in Am^a 1 Wmiff 169, stat Cap 212.

Generally the settlement of the father or the maintaining parent is the settlement of the child; & if such parent acquire a new settlement it immediately becomes the settlement of the child. By the acquisition of a new settlement the old one is lost 1 Wmiff 169, stat 58. 2 Day 532, La 544, & a person can never have but one settlement at a time, tho he may have a right to two or more. This, I suppose, does not apply to the case of a wife when they gain a settlement by owning property tho it probably does if they gain it by commorancy 1 Wmiff 168. Children under 7 years of age must always go with the parent. & therefore during this period they cannot gain a settlement by commorancy La 1 Wmiff 168.

If the father & mother have no settlement the place of birth is the settlement of the children. A child above 7 years of age may also gain a settlement of his own by commorancy. & then his derivative settlement is lost. The law is the same in Bre. Before a child is emancipated, he may take the benefit of any settlement which his father may gain 3 Inst 47 555. The latter being dead, the mother's settlement is that of the child. Day 1473, Sta. 796. Burget La 49.

For what amounts to emancipation see 3 Inst 555. Burget La 476, 658. Sta 458, 731.

A widow by marriage gains a right of residing with her husband, but acquires no settlement for her children. This rule however seems questionable even in Eng. principles so far as it respects widows, 76. who at the time of their second marriage were able to support their children. For in that case the second husband is obliged to support them & it seems in such case they ought to acquire a settlement. (vide ante c. 526.)

If the father has no settlement the mother has one of her own, her

Guardian & Ward.

26

settled shall be that of her children. but, see Ca 367. 1. Bull 1694
(qu. for is not her settled suspended during coverture?) But after
the coverture ceases, the wife's settled will revive in favor of her
self & her children. The wife by marriage gains the settled of her
husband if he have any, but if he has none, tho she gains no new
settled she does not lose her, &c. &c. Sta 683. 574.

In Con. the mother's settled is that of her illegitimate children (vide
~~note~~ 63) The guardians settled is not that of the ward, for it is
convenient for the guar. to maintain the ward as one as another, Knot
131. On the subject of settled see 3 Burns's 300 &c. & see all the
authorities on this branch of the Law are cited.

Master Servant.

The different kinds of servants / Slaves, & apprentices. 3 Menial 98
servants, 4 Day laborers, 5 Agents & Factors &c. 6 Poor debtors, & 7 in series. 28

Slaves

Slaves in Con. if there are any legally such, differ from other servants only in the duration of their service. It has been doubted, however, whether slavery in Con. has ever been legalised. If slavery is legally sanctioned in Con. it legally must depend on stat or judicial decisions. For by the common law it clearly is not warranted. If stat. sanctions there is no stat in this state expressly warranting the holding of slaves. But two states one obliging masters to maintain their slaves & the other emancipating at the age 25 all who shall be born after the year 1783 have been that to give an implied sanction to the practice. In Massachusetts, where the existing laws respecting slavery were the same as in Con. it has been decided by the S. Ct. that there is no slavery. No judicial decisions. The majority of the judges of the S. Ct. have in several instances discovered their opinion to be that slavery in Con. has been legalised: but there has been no adjudication which has expressly settled the point. It seems to be generally agreed that an offender may judicially be condemned to slavery for crimes. It has been holden by the sup Ct in Con. that the presumption is in favor of the liberty of the white man, but again st. that of the black S. Ct. has been decided that a master cannot maintain trover for a slave, tho he may be sold or taken in Con. The Ct. held that the action to recover a slave from a third person must be the same as for the recovery of an apprentice & indeed they appear to have considered slaves as entitled to the same rights as other men except that they are bound to perpetual service. If a master had once sold a stranger or retained his servant the man continues to retain him, the master may bring a second suit. The Sup Ct in Con. have considered the sale of slaves in the nature of an assignment of an apprentice. By the custom of London they seem inclined to hang on to the ground that slavery as far as it relates to the master's right to the perpetual service of the negro is legalised. The S. Ct. have also said that a negro in slavery might receive property from his master by his free will & in consequence thereof it would seem that a slave in Con. might maintain an

Master & Servant.

29 action against his master. Indeed a negro has once sued his master for selling him to a distant master, & this separated him from his family, & tho there was no adjudication, the Ct. finally advised his master to release him as he did so. If a master consents to the marriage of his servant, it is considered as a complete emancipation on the ground that he has contracted with his master's consent, a relation from which result duties incompatible with a state of slavery.

Apprentices.

Apprentices must be bound by deed. 1 Mod 182. 6 May 1117. Sal 67. Colet 42. This is a principle of common law & appears to be the only instance in which writing was necessary to the validity of a contract, (viz. a child incorporated hereditament to be conveyed at common law, without writing, 33 Mod 64, was not writing also necessary to the validity of a devise.) But any other servant may be bound by parol, by service all sorts of laborers, except apprentices become entitled to wages according to their agreements. 2 Coles 47. 1 Bla 483; 7 Mod 15. 11 Co 84. Sta 604.

By a stat of Eliz. minors are empowered to bind themselves apprentices but as the minor privilege to avoid his contracts is, not in this case, expressly taken away by stat, the Ct have determined that a contract thus made is avoidable & of course that the infant is not liable upon the covenants. Coles 574. 494. Coles 447 Doug 578. 5 Derry 716.

In all other respects minor apprentices are upon the same footing with other servants, & the master has all the rights common to other masters except that he cannot hold the minor to his covenants, & no stat like that of Eliz. exists in Con. minors here cannot bind themselves by indenture at all. Can guar in Con bind their ^{own} ~~own~~ apprentices? Stat 2 QB. according to usage which is probably regarded ^{as} ~~as~~ ^{the} ~~the~~ ^{can}, the master at common law cannot assign over his apprentice because fiduciary, personal trusts reposed in the master, by the parent, & testamentary trusts are not transmissible Sta 1267. Sal 67. Dyer 63. 11 Mod 96. The Ct. but being liable to perform the personal trusts of the

Master & Servant.

- A promise made to a servant transacting his master's business or to any one acting in the capacity of a servant, when the servant is authorised to contract, is considered in law as made to the master.
- §1. An action may be brought on the promise in the master's name 3 Burr 59. If a servant has been cheated out of his master's property an action lies for the master, or for the servant, if he brings his action first, but a recovery by one is a bar to an action by the other. The reasons assigned for allowing the servant to maintain an action in this case are that he is liable to the master, that there is frequently a necessity for a more speedy prosecution, than can be issued by the master. So far as these reasons extend they appear satisfactory, but adjudications have frequently been broader than the principle. Croda 123, 4. 11 Mod 303. See 289, 301, 613.
- If a servant does an unlawful act by command of his master, both are liable; for the servant is only to obey his master in things that are honest & lawful 3 Burr 563. 1 Wils 456.
- When the master is liable for the act of the servant, which is innately injurious, trespass, &c. no case must be lost. 5 D & S 648. Gib. 125. Money gained from the servant by an illegal contract, may be recovered by the master; but if the servant squanders or foolishly spends money, with which he entrusted him, it cannot be recovered 3 Burr 559.
- If a servant in the performance of his master's business, commits a wrong, the master is answerable in damages, but if a servant when he commits a tort, is not then employed in his master's business for, he, & not the master, is liable. 1 Ray 120. 73 D. North 58. 1 Vent 140. 295, 301, 441. 3 Burr 563-5. 1 Kins 228.
- If the injury be occasioned by mere negligence, then in the case just mentioned, if the servant is in the discharge of his master's business, the master is liable, if the tort be wilful the servant is himself liable.
- Is the master in any case liable for the wilful torts of the servant committed with force, unless by his command? 6 Durn 125. 3 Acc 61.
- If the tort arises out of a contract made by the master's direction, the master is liable in all cases, tho' he is not under no tort, in ~~the case~~

Master & Servant.

102

the servant committed it willfully, formerly in Eng. if the servant
 negligently committed a tort in the execution of his office, the Sheriff was not
 liable, but now he is liable in tort tho' not in criminal. 3 H. 309. Day 46.
 In none of these cases however, is there any necessity of suing the master. 82
 if the servant is able to answer in damages, for he is always liable to the
 party injured in the first instance. This is true in the case of willful torts
 & probably those committed thro' negligence, but not incommittible wrongs.
 Whenever the contract of the servant binds the master, it is considered in law as being
 the contract of the master himself. This is the ground of the master's liability.
 The liability of the master in this case cannot be destroyed by any private
 dissolution of the connection between master & servant. 10 H. 30. Day 26.
 209. 1 Shaw 95. The servant cannot pawn his master's goods, this rule applies as well
 to factors as to other servants. 3 Den. 604. 9 D. 108. 11 M.

In case a factor pawns the goods of his principle, if the pawnee refuses to restore
 them on demand by the principle, trover will lie, yet if the factor has a lien
 upon them for a demand against the principle, the money must be ten-
 dered to the factor before the action will lie against the pawnee, 3 Den.
 604. 10 M. 1138. For the negligence, mistake, &c. of a servant committed
 directly in the master's business, the master is always liable & sometimes the
 servant also, 3 M. 313. 2 Hol. 693. Cro. 181. 10 M. 1084.

It has been adjudged, in Eng. that if a master sends his servant as a pair to
 sell horses, having secret diseases, but gives no direction to sell them to
 particular individuals, as to Cro. 181. the master is not liable for the same.
 10 M. 1084. There is a difference between a general & special agent in
 this respect 3 Den. 757. 2 Wms. 464. But these decisions are not founded
 on principle. The case in Cro. 181. 10 M. 1084. considers as false law & supposes that the
 master is liable for the fraud of his servant transacting his business, tho' he was
 not going to the market, & a master allows a servant to trade for him in his name the
 master is liable for his contracts, because he has given him credit with the
 public, & a warranty by the agent in transacting the principle's business.
 And the latter is not the agent's authority, was so properly restrained. 2 M. 693.
 10 M. 181. 3 M. 323. 10 M. 1084. 3 Den. 757. 4 M. 177.

23

Postmaster have been adjudged not liable for mistakes & their servants, which is an exception to the general rule *Carth* 487, *Daly* 646, *Coro* 184, *Con* 100. In most of the foregoing cases the servant is liable as well as the master. The rule of discrimination appears to be this: whenever the fraud or injury committed by the servant in his master's business is direct & intentional, the servant is always liable as well as the master; otherwise, if the servant be a mere instrument, ventrally *id est*, *in* the fraud or injury, *6 Durnf* 126, *1 Kent* 196, *1 Kay* 120, *Idol* 446, *Carth* 57, *cont* 186, 95. And in cases of negligence by the servant, when the transaction is such as cannot imply a contract, both master & servant are liable, as in the case of the pipe of sack lifted by the servant negligently & carelessly in driving a team *Daly* 739, *2 Kent* 295, *god* *ans*. But when from the nature of the transaction, a contract may be implied, the master only is liable to the party injured, as if an apprentice lame a horse in shoeing him, the writtfully done, *1 Bla* 457. But when a servant willfully cheats another, he was sued & made liable in damages, he afterwards brought suit against the master for indemnification & it was holden that he was not liable, *Coro* 471.

It has been adjudged in the *Eng* Ct that a petty is not liable for promoting fraud in favor of his own & cont. against the opposite party in the action *1 Rot* 254, *1 Rot* 95. This case & that of the *Son* keepers servant selling corn at nine in *1 Rot* 95, appears to be contrary to principle. Coercion arising from mere violence, or from fear not amounting to duress for minors, will not justify the tort of servants any more than those of other persons. And in general the contracts of the servant acting under the master's authority, is the contract of the master, yet when the servant in transacting the master's business, makes an express contract of his own, or on wages for hire as he is personally liable, *gela* 157, *4 Durnf* 177. A servant of the sort if within his authority, is binden on the master *4 Durnf* 177, *Idol* 357. A servant may also in some instances be made liable on an implied contract, tho' acting for the master, as when he does not use his master's name *Pri* Ch 46, *3 Mac* 563. A promise to the servant in the transaction of his master's business is in

contemplation of law, a promise to the master, & the master may sue upon it in his own name. & the contract can be so identified as far as an action to the servant. When the master not being in fault is made liable to the party injured, for the loss or misdeeds of the servant he has, in many cases a remedy against the servant. The rule of strict imputation seems to be this: that as the servant implicitly promises diligence & fidelity, in his master's service, if in transacting the master's business, he does any injury, thro' the want of either of these qualities, he is liable to the master. tho' for the want of skill he is not. Cow 391, Durnf 535, 11. Ter 109.

The master has an action against the servant for disbeobedience, if he incurs any damage by it, but not otherwise. 2 Durnf 128, 2. 188, 101. 115. 116. 117.

It is a general rule of common law, that if property is voluntarily trusted to one, who may carry it away wrongfully, he is not guilty of theft, but a mere civil injury. The stat 13 Hen 8. has made this offence felony in servants, except in apprentices, & others under the age of 18. Whether this stat is binding upon law is doubtful: but in general it is supposed not to be. Some hold however, that in case of bailment, theft commences as soon bailment ceases.

But if a person makes an imposition, to get possession of a nother's property, & then carries it away wrongfully, he is guilty of theft, tho' the receiver in case of a sale by a thief is safe, 2 Durnf 76. quare. From several late decisions at the Old Bailey, it would seem that any bailor who purchases the goods entrusted to him is liable as any other person for theft, 1 How 135-6. n. When there is a premium given with an apprentice, why will compel a restoration of part on the death of the master or apprentice 114. 966. The rule is not the same when the master loses away the apprentice, tho' the remedy is at law for breach of covenant, or perhaps by indictment: as the consideration has failed. 4 H. 5. 11.

Factors are bound strictly to pursue their commissions; such as may retain the goods of their principals to satisfy their demands; yet if their possession is given up, their lien is at an end. 2 Com 427, 1. 2. 137, 1. 138. 493.

Master & Servant. Correction of Servants.

The law respecting the correction of servants is general the same as that which regulates the correction of children. It is said a master may not wound a servant. But by this is probably meant that he may not use dangerous weapons, or intentionally abuse him in a dangerous manner. But if a master in giving his servant reasonable chastisement accidentally wounds him. He is supposed he is not liable in damages. The same law is said to apply in Eng to all servants. Sid 145. 2 Mod 167. Vent 76. (1 Bla 454 cont.)

But in Con the right of correction extends not to the masters of laborers, tho' it does to apprentices, & perhaps to merical servants. A master can not justify a wounding, tho' in some cases, he may excuse it. 4 Mod 141. 2 W. 358. etc. servants of full age, except apprentices, in Eng may be corrected. 1 Haro 111. 7. 1 B. 107. 2 Keil 623. The correction must be reasonable & moderate. 2 Mod 167. & 100. 1. The master cannot delegate his right of correction to another, except in some particular cases, as to a schoolmaster. 4 Sha 953. 9 Ca 76. 2 May 62.

Of the Masters remedy in certain cases.

A servant may justify an assault in defence of his master, but whether the reverse of this rule will hold is unsettled. It would seem that on principle the right ought to be reciprocal. But the authorities are contradictory. The master however may have an action per quod & against any one who has beaten his servant. 1 Bla 455. Co. 314. 1 Keil 546. Sid 417. 9 Co 113. 10 Co 131. 7 Geo 4. 2 Keil 587. (1 Wm 157 cont.)

Why may not a master justify in defence of his servant? If he does, no more than is necessary. He may justify interfering to preserve peace, & only not to prevent damage to his servant, instead of suing, by for an action. Prevention of an injury being much better. 3 Bla 569. A servant can not justify a battery in defence of his master son, because he is not master to him. Dalt 72. nor in defence of his master's goods. Luttrell 197.

109

69

20. 10. 1900 (100) 1000

Executors & Administrators, (Contd.)

- 91 Executors & administrators represent deceased persons for certain purposes. Co. L. 204, 1 Com 134. 2 Bar 409. Co. 204.
- They are the representatives of the deceased in every respect as it respects his per. prop. & such duties as respect such prop.
- An Ex^r is a person who is appointed by the last will of the testator as his representative to carry into execution his last will & testament concerning his per. prop. so far as it is disposed of by the will. 2 Bl. 505.
- It is the absence of a will that an Ex^r is appointed therefore any disposition on a prop. without appointing an Ex^r is good as a testamentary disposition, but it is no will. & such disposition to be good must be made in contemplation of death & to take effect after the decease of the testator. Co. L. 111, 1 Com 281, 2 Bar 42, 2 Bl. 505. The next Ex^r 2. 202.
- The person appointed to carry such testamentary dispositions into execution is called an Ex^r cum testamento annexo. 2 Co. 2.
- A particular form of words is necessary to create an Ex^r. 2. 202.
- Swinsb 247, Godol 425, Wentw of Ex^r 4. 12 Dy. 96. 2 Bar 392.
- An Ex^r may be created without making a disposition of property to or vice versa.
- Merely appointing an Ex^r makes a complete will & it is his duty in such case to dispose of the per. prop. of the deceased according to law. 2. 202.
- Therefore a testament may exist without a will & a will without a testament.
- A will in contemplation of law is a gift to the Ex^r of all the per. prop. of the testator, subject, however, to certain charges & duties. At common law an Ex^r was considered as a trustee only for the creditors of the deceased & after they were paid, he was entitled to the remainder. But now he is considered ~~the~~ as a trustee for the representatives of the deceased likewise & for all those who are entitled to the testator's per. prop. under the stat of distributions & otherwise. Godol 282 the next 3.

A disposition of real prop^y is called a devise Co Lit 111.

An admin^r is the representative of a dec^d interlate, as it respects his per prop^y, appointed by the law through its proper organ or minister 1 Cor^y 257. 2 Bla 496. In Eng this organ is the ecclesiastical court in the judges R^ochaster. There are but three cases in which an adm^r can be appointed, 1st When there is no Ex^r. 2nd Where the Ex^r cannot act by reason of some legal disability. 3rd Where the Ex^r refuses to act. 2 Bla 496.

Ex^r & adm^r are trustees for three classes of persons, 1 Creditors. 2 Legatees. 3 Heir persons as an entitled to the per prop^y of the defunct, under the stat^o of last intentions. Hence it is that Chan^l interferes, to compel them to execute their trust, 19 How 381. 5 Alk 546-7.

An heir is one who is designated, by law, to succeed to the inheritance estate, of his ancestor, upon his decease 2 Bla 274.

A devise is one who is entitled to real prop^y by virtue of a testamentary disposition. 3 Bra 466.

A legatee is one who is entitled to per prop^y, in the same manner. Godol 271. 2 Bla 578.

Ex^r & adm^r in Eng. have no power over the real prop^y of the testator because, at common law lands were not devisable. But in Wales were to be sold for payment of debts, & no one be appointed to sell them, the Ex^r must do it. But an adm^r can, in no case have that power, 104th 420. Pow In 299.

It is said, that both in Con are representatives of the decedent, as well as to the real as per prop^y. But (p^r W. Gould) this is an erroneous opinion, because they cannot, neither of them sell real prop^y in esse mortui, but must have an order of Probate. & Ex^r cannot bring a writ an ejectment to recover the lands of the testator, & so it has been repeatedly determined in this state, & it has been decided in 10th County, that he cannot even bring an action of trespass, for a trespass done upon the land of the testator, but it must be brought by the heir, for the title is complete in him, till there is an order of Probate to sell.

Executors & Administrators.

Therefore it is evident that the Ex^r &c^{ts} has neither j^{ur} in rem, or in re. A legatee must receive his legacy through the hands of the Ex^r asked absent is necessary to rest a complaint with & if he take it without his assent, the Ex^r may maintain trover against him. But a devisee does not take real estate through the hands of the Ex^r but

may enter upon it immediately on the death of the testator, even against the will of the Ex^r.

In Eng^l all the per prop^{ty} of the dec^d is liable for all his debts but his real prop^{ty} is liable only for debts by specialty & those of a higher nature. Lov. 93. 2 Bla 346. 378. - 243. 4.

At common law, debt is due by judgment bound the land from the first day of the term in which such judgment was recovered & they were liable even in the hands of a bona fide purchaser. If they came into his hands after such judgment was obtained, & the chattels were bound from the date of the execution. But by stat. 24 Car. 2. the real estate is bound only from the signing of the judgment & the chattels from the delivery of the execution to the officer 3 Bla 421.

If the specialty creditors & those of a higher nature resort to the per prop^{ty} for the payment of their debts, & the personal fund is exhausted, the simple contract creditors are remediless at law. Lov. 93. 2 Bla 377. 384. 438. But Ch will let them in upon the real estate in the hands of the heir, for the payment of the per fund^{ed} exhausted by the specialty creditors, 2 Rev. Mor 377. Talbot 1 Exch. 44.

This relief in Ch is by a decree to sell so much of the real estate in the hands of the heir, as will raise the sum taken from the per fund^{ed} by the specialty creditors, provided such sum do not amount to more than the simple contract debts.

The Ch appoints some person (usually the Ex^r) to sell so much of the land, Ch will grant the same relief to legatees under like circumstances, provided there is per prop^{ty} sufficient.

to discharge the simple contract debts & legacies, &c. 4th.
If there be not sufficient per prop to pay all the simple contract creditors,
what there is, is taken by the specialty creditors. Ch will not pay one simple
contract creditor all his debt out of the real estate, but will order so much debt
sold, as raise a sum to the amount of the per prop, sold in, & order all the sim-
ple contract creditors to be paid, pro rata. The law in law is the same
with respect to insolvent estates, but with this difference, that the real as
well the per prop is liable, to all the debts both by specialty & simple contract,
equally. Persons having debts in equal degree, he who first obtains judgment
must be paid the whole of his debt, so too if he commences his action first,
he gains such a priority, that the Eq cannot by any voluntary act of his deprive
him of his security, therefore if he pay another creditor after such action com-
menced, there is not sufficient right to pay the debt of the person commencing
the suit, he must answer it out of his own estate. But he does not win this
priority merely by commencing the suit, for if another obtain judgment in any
legal means before him, he is postponed. 3 P 100 401, 402 217. Bro 24. 487.

In Equity if land be devised to an Eq for payment of debts, he cannot be sued at law. 15
as having assets in his hands, for lands are not assets at law. 1 Com 401. 1 Mod 906, 2 Mod 106.

So can he be compelled to sell them for the pay of debts.

But Ch will compel him to execute the trust, by selling the land, at being
considered as equitable assets 1 Atk 426. The reason why he is not compelled
at law, is that the Eq as such has no right to the land.

There are four kinds of assets. 1 Real assets, which descend to the heirs, are
liable to such debts as bind the real prop of the testator & these assets may
be either in fee simple, or fee tail. 1 Com 348. 3 Mod 254. 3 Lev 486. 2 East 127. 2 Bla
246. 514. 346. 2 Personal assets which are in the Eq &c. 4th. & are liable
in their hands to debts of every description, & to legacies as the case may be
10 Bla 516. 1 Com 344.

3d 4th Legal & Equitable assets. Legal assets are such as go in a course of
administration, according to law, i.e. according to the priority of debts.

Executors & Administrators.

Equitable a sets are such as distribute equally among all the Credit
 as without regard to priority. See Nov 125. 9. 1814/436.

An equitable redemption is equitable affects 1st Ver 411. 2nd 66. 2nd RK 296.
3rd 11th Ver 341. Porc. Nor 124.

19. one person or of an estate in fee, raise a term of 1000 years, & mortgaging that term, the reversion expectant is legal assets in the hands of the mortgagor & especially, and may sue the heir immediately on the death of the death of the mortgagor, to take out & give, but it cannot be satisfied until the term is paid back in, or the reversion takes place. Per 411, vol 354. 22 or 134.

Where lands are devised or directed to be sold, for the payment of debts, it is a question whether they are legal or equitable assets. When lands are devised in trust to an Ex^r for the pay^t of debts, or a power is granted to him in that purpose, they are considered as legal assets according to the ancient Doct^r. 224. And 405, 1 Co. 63, 22 Hen. 6. 24, 415, Broke 17, 156. 2 P^{ms} 32, 46, 147 & 410.

But the latter authorities & some of the ancient ones consider the money arising from the sale of land so devised to the Ex^r as equitable assets, & then view him in the capacity of a trustee, rather than as Ex^r. Finch 46. 2 De. 133, 144 & 485. 2 R. 50. 1 Bro Ch 135. Bro 11 12 & 4 P 383 & 426. in note, (but) p. 11 & c. c. the latter opinion is law.

When there is no devise of land for the part of debts, but it descends regularly to the heir & it is ordered to be sold, the money arising from the sale is considered as legal assets, even if it was a trust estate, 44 Cr 1270, 2 P Wms 416, see also 243. 1 P Wms 431.

Monopolizing, from the sale of lands, when there is a naked power
to sell for the profit of debts, is considered legal effects 1 Atk 484.
1 P. 1111 436

But this distinction seems now to be exploded, the money arising from such sale is considered as equivalent assets, according to a late case determined by the Exchequer. His lordship does not revive the old rule here laid down, but reads it by saying that a bare power to sell breaks

the descent of this rule is now considered as settled (Bro Ch 1367, 146 in note
 20 L. 112, 113, 2 L. 286. When lands are specifically devised they cannot be taken
 from the devisee for the payment of debts, before the real assets in the hands of
 an executor. Otherwise when they are devised for the payment of debts, ~~not~~ ^{not}
 according to the rules of Ch in Eng. & law here, simple contract debts, as such
 are not preferred to specialty debts. There is no priority given on account of
 the evidence of the debt, but there is a preference in our law on account of
 the circumstances & situation of the creditor, & the cause or consideration
 of the debt. This is only where the estate is insolvent, in that case the statute says
 that all funeral charges, debts incurred in the deceased's last sickness &c
 debts due to the state shall take the precedence of all others, which of these
 three species would take precedence is not determined but probably accord-
 ing to the order in which they are fixed in the statute.
 A rule laid down by Mr. Keese, is that whenever debts are charged upon the la^{ty}
 me by the testator, the ex^r may come upon the heir for so much as the creditors
 have taken out of the personal fund, & specially executor may sue in an
 action of debt either the heir or ex^r, so he may one for half the debt & the other
 for the other half at the same time, but if he obtain satisfaction of one he can
 not proceed against the other. Ex 199, Plow 246, 2012, Co. 450, 3 L. 189, 300.
 2 L. 225, Ex 12 & 22 are bound by the personal contracts of the testator or
 intestate, tho' not named, except in those contracts which are strictly li-
 derial, which form an exception to the general rule. Vent 119, Co. 189.
 But in Eng. the heir is not bound by the personal contracts, e. g. a mi-
 gin Con he is not bound as heir the named. Plow 496, 446, 66, 2 L. 472, 1654.
 At common law neither the body of the debtor nor his lands could be
 taken for debt, but only his personal estate & the rents & profits of the lands. 2 R. 672.
 When the heir is liable for the debts of his ancestor, he is liable only to the extent
 of the lands received by descent, in no case is his body liable to be taken, unless
 he has suffered judgment by default. Co. 1103, 296, 2 L. 472, 2 L. 476.
 The law that is taken must be applied to the creditor, until the rents
 & profits will pay the debt. Plow 439.

The lands of a debtor was first made liable to be taken in ^{his} ~~the~~ execution by stat. Edw. 3. 3 Plac 329. 3 Plac 414. that 2 by which stat one half the debt ^{to} ~~of~~ ^{the} must be

the land might be taken. The same year the stat de mortuoribus was passed which enabled a debtor to bind all his lands by entering a recognizance. 2 Plac 160. 3 Plac 414. 2 Rot 475.

The body of the debtor was first made liable to be taken in ^{the} ~~the~~ execution by stat. Edw. 3. 3 Plac 329. 3 Plac 414.

§ 24. 48th must be sued in the debt only & not in the debt & the body cannot be taken for such debt, unless by some act of theirs they have made themselves liable as bond proprietors. 4 Co 159. 158 379. There are some exceptions to this rule, as where the testator is in possession of a lease for years & rent arises after the testator's death, in that case the ^{testator} ~~testator~~ is personally liable. Sal 207. 1 Rot 603. Co 187. 7 Plac 186. Co 411. 546. & where he has done a wrong or committed a delinquent, but even then not till judgment & 89th hang on against him. de bonis testatoris. 1 Sid 547. 1 Rot 603.

An heir is different in this respect from an ^{ex} ~~ex~~ or ^{ad} ~~ad~~ for he must in the first instance be charged in the debt & acquit, for the land itself is charged with the payment of the debt & he holds the land in fee. If he does not acquit, it was good cause of arrest, but since the stat 28th it is cured by writ of 5 Co 36. Plac 440. 2 Plac 344. Co 171. 15. 150. 1 Plac 776. Co 216.

At common law the heir could defeat the bond creditor by aliening the land before action brought. But if he did not die before the writ was put in, the land was holden in the hands of the purchaser & 12 Car 2 45. 1 Sid 458. So a remedy this a stat was passed in the 8th of Henry 8. which made the heir liable as bond proprietors, to the amount of the debt, if he aliened before action brought. 1 Co 149. 1 Plac 177.

No man can bind his ^{body} ~~body~~ by an act of his which would not bind himself. Co 122. But this is a civil law by good authority.

It is common law the lands of the testator in the hands of a devisee were not liable either at law or in equity for the debts of the testator. 14 Eq. 219 & 1 Wm 37th. Sec 431. But by the stat 11 Geo 4th. Many such lands are now liable to the specialty creditors, & they may sue the heir & devise jointly. 1 Eq. 225 & 230 & 379. 3 Bac 27.

This extends no farther than devises which are beneficial to the devisee. Therefore if lands be devised to one for the payment of debts, or for the purpose of raising portions for young children, he is not liable to be sued by the creditor for the case is out of the stat 3 & 4 Geo 4th. Sec 114 & 115.

The heir of an heir is liable to a bond creditor of the ancestor of his ancestor, so far as he has received real effects which belonged to the original ancestor. 11 Geo 4th. Sec 114.

In declaring against an heir it is necessary to state whether he be lineal or collateral heir to the debtor. 14 Eq. 226.

But the executor of the heir is not liable to the bond creditors of the ancestor of his testator, because the lands descended to him he being a personal not a real representative.

But if the heir has sold the lands which descended to him & has received the money, whereby his personal estate has been benefited, he must follow the money into the hands of his executor. 11 Geo 4th. Sec 114.

In law, an heir cannot be sued or sued for the debts of his ancestor, for the executor of the heir is a real as well as personal representative in every respect, & both the real & personal estate of the testator are a fund for the payment of all his debts (see before page 99).

It is not necessary to pursue in the case above mentioned.

Who may be Executors & Administrators.

All who are capable of making wills may be executor of one, & many others besides. 2 Co. Inst. 55. Sec 1.

Many may be executor & have all the rights of an executor, except that of acting at common law as a villain, viz. the executor. Infants in no case may be executor. 11 Geo 4th. Sec 103. Mentice 155. 107. Com. Rep. 236.

Off. 2d. 2d. 374. See 11 Geo 4th. Sec 104.

Cocculos & Administrators.

If one appoint an infant, in ventu sa. mure. Eq^r & there should be two born, they will be co-executors. Ventu 218.

Infants cannot act as Eq^rs until they arrive at the age of 17 years. before that time an ad^r durante minority, cum testamento annexo. must be appointed. Ventu 218. 14. godol 102. Hob 256. bo. 135. 1 Zou 76. 5 Co 29.

The acts of an infant Eq^r ^{under 17} are not binding, he cannot sell the goods of his testator, nor assent to a legacy, nor can he be bound by his assent to a legacy while an infant, unless he has assents, as adult Eq^r may. godol 103. 5 Co 24. Ventu 218. 14. 1 Zou 76. 1 Ch Ca 257.

If an infant Eq^r under 17 receive the debts of his testator, & give a receipt, he is not bound by such receipt, but may recover them again. Ventu 219. In one case it was holden that an infant Eq^r under 17, may sell the goods of his testator to pay debts, & that he would be holden even if another should sell them by his command. Cro & El 54.

But this case is doubted to be law, because it is contrary to the general rule that an infant Eq^r can do no act which will prejudice himself as other Eq^rs may. Cro El 671. Cabot 172. Ventu 285. 1 Not 730.

It is a general rule that an infant Ex^r is bound by receipt of his, which is not done in the proper discharge of the duty and office of an Ex^r. Cro El 496. Ventu 319. 2576. 1 Com 249. Ventu 319. 5 Co 27.

An infant Eq^r who under 17, is not bound by any receipt, release, or discharge he may give for any debt due to the testator, unless he has received the full amount of the debt. 1 No 146. 5 Co 27.

It is a general rule that he can do no act which would subject him to a restraint. 1 No 328. 1 Zou 76. 77. 1 Rolle 730 - Bue 374.

If a bond be given to the testator, which is forfeited, & his infant Eq^r gives a discharge for the penalty, on receiving his principal & interest, it will be no bar to an action at law for the penalty. 1 K 730. 1 Co 299.

An infant Ex^r when sued must appear by a guardian, & if he does not the jury may be removed, for he cannot appoint an Atty. 1 K 737. 20th 130. Cro El 491. 492. 491. 1 Rol 224. 1 Not 49.

"Infant Eq^r cannot on any act take be a Atty."

If an *exr* sue by *alt*, & *exr* goes in his favor it cannot be reversed,
1st because he sues in right of another, & 2^d because it is for his benefit.
Coca 144, 1 Mol 150. But if an infant *ad* sue by *alt*, the jury may be sworn
as it be, as it may, for an *ad* cannot act until he is of age. 3 Bull 146.
1 Mol 247. (Coo El 541 contra).

If an infant be *exr* with an adult they may both sue by an *alt*, for 101
the adult may appoint one for both. 2 W & L 273. Carth 124, 1 Kent 102.

2 Kay 132 - Coo, 1449.

But they are *Dolls* the infant must appear by guardian. 3 Mol 236.
1 Mol 247. Sta 784. An infant *alt* is in no case liable for costs nor an
exr who sues for any debt which became due in the life time of the
testator, in Eng. According to the Canon law a *res* cannot
be an *exr* or *alt* even against the consent of the husband, & may sue
& be sued alone. Mentis 202, 281, 296. Godol 110. 10 96 78. 11 11 11.
The common law agrees with canon, so far as it may be consistent
with the husband's rights, but it will not infringe them, therefore a
wife cannot act as *exr* without her husband's consent, as his mar-
ital rights may & will be affected thereby. Therefore the *lt* of com-
mon law will grant a prohibition when the spiritual *lt* attempts
to compel her to act *exr* against her consent, in conformity to the will
of the husband. Godol 109, 100. Bree & Co Ex & A. - 11 11 11 11.

But if the husband act as *exr* against her consent, she is bound
by his acts during jointure. Eden 100.

So if she act against his consent they are both bound, & can never
afterwards plead *ne iunges exr*. (idem)

If a feme sole be appointed *exr* & she afterwards marries, & her
husband administers, she cannot afterwards refuse to act *exr*,
A feme covert *exr* may make a testament of the per prop of her tes-
tator, without the consent of her husband. 11 11 11 11.

But this rule is controverted 1 Mol 688 1 Mol 211, 12.

It is certain, however, that she may make an *exr* of such goods as

Executors & Administrators,

against his consent, who will have a right dispose of those goods, from whence it necessarily follows that he may make a testament. Moor 431. Butcher 92. 1 Roll 608. 912.

But he cannot make vs of goods in his own right, in any without assent of his husband for he is entitled to administration 40571
In any the king may be an Ex^r & may appoint commissioners to administer or act in his stead 1 Com 235 Godd 96.

122

An aggregate corporation cannot be an Ex^r yet because it has formed for special purposes. & because it cannot be a trustee for an other. & because they cannot take the oath prescribed by law. & this seems to be the most weighty reason, for the first two would equally apply to sole corporations, 1 Vent 17. 25. 1 Com 235. 2 Ray 963. (contra 1 Rolle 113.)
But a Corporation sole may be an Ex^r. Godd 45.

Some persons by reason of infamy cannot be Ex^{rs}, but they are never excluded from any offices against the temporal law, when unincumbered with ecclesiastical, 1 Vent 17. Godd 45. Cal 124. 100 914.

An outlaw may be an Ex^r & tho he cannot sue in his own right yet he may in other respects. 1 Lev 186. How 261. Cal 124. 200 459.

But persons excommunicated cannot be Ex^{rs} Cal 134. Godd 45.

An alien friend may be an Ex^r & have the disposal of a chattel real as well as personal, & rents arising from the land 1 Vent 17. 22. 1 Com 235.

But the civil law was otherwise except in the cases of military wills, Idols, Lunatics persons non compos & of non sane memory cannot be Ex^{rs}. So if one after proving the will become non compos an adm^r must be appointed, even testaments annexed servants non compos.

An alien enemy may be an Ex^r & may hold the goods of his testator but he cannot do this in his own name or aut^{or} deit. Cal 142.
(Cal 143. Moor 431. Skin 376 contra) per H. C. 4. roll 96.

The ordinary cannot refuse probate of the will on account of the insolvency of the Ex^r & if he should the Ch^{of} West^{er} would give a mandamus to compel him, neither can he require security of such Ex^r for the

Executors & Administrators.

It was a rule at common law that a man could devise a real but not
 thing of his personalty, the other two things being what was called the ratione
bonorum & his wife & children, if he had neither wife or child, he might give
 the whole, if only a wife, or a child, he might dispose of one half. 2 Bla 491, 2-5 1773 1780

104

"When this rule ceased to be law is unknown, but certainly before the stat
 1st Hen 8 a man might devise the whole of his personalty. When the ecclesiastics
 first began to exercise their power over that part of the intestate's property which
 he himself had a right to dispose of, they exercised the right in procurator
personas without the intervention of an administrator, if it was they pleased
 being accountable to nobody, but only to their own consciences. & were
 not obliged even to pay the debts of the intestate. Finch 173. 3 Kay 497.
 By the old law, the Ex^r after pay^t of the debts, was considered as the devisee of
 the remainder, unless it was disposed of by the will: & was not as he is
 now obliged to distribute it among next of kin. 2 Bla 495.

"The right of administration in the ecclesiastics drew after it the jurisdic-
 tion of the probate of wills. The stat 1st Hen 8 passed in the 13th Edw 1 gave
 the first check to the unbounded power of the clergy in disposing of
 the property of intestates, by that stat it was enacted, that the ordinary
 should pay the debts of the intestate to the amount of £100 in his own
 hands, the remainder, if any was left, in statu quo. Chal 1378.
1 P^{ms} 7. 5th Edw 247. 2 Bla 454. Co Litt 133. 1 Rol 906.

The next stat in order of time was the 31st Edw 3. which defined them
 the power of exercising administration in procurator personas & ap-
 plying the property that might remain, after debts paid to parsonages &
 the endowment of the church, is enacted that the ordinary in all
 cases of intestacy, should appoint some person, next of kin to the
 decedent as administrator, the person so appointed stood in the place of the
 ordinary & was liable to the debts of the intestate as far as the
 ordinary was subject by that stat 1st Hen 8. & any thing remaining
 it was at his disposal without any liability to account.
2nd 2nd 414. 3rd 494. 2nd 496. 4th 496. 5th 497. 2nd 496.

Executors & Administrators.

124

Wherever thought of proving wills exists, then, generally speaking, the right of granting administration exists also.

Whereas this may have existed formerly, it most clearly exists at present in the spiritual Ct in Eng. except in some particular cases 105
1 Kay 415, 416, 447. 1 Ed 359, 1 Rot 906. 2 Bla 445. Sal 37.

The king in Eng. is said to be the supreme ordinary of the kingdom & may grant letters of adv^{ce}, but his power to do has lately been denied. However where a person dies intestate, having no kindred who are entitled to adv^{ce}, the king grants letters patent to whom he pleases, & the person to whom they are granted presents them to the ordinary who is generally appointed to receive the the ordinary may refuse if he sees fit. If the king grant letters patent to none the ordinary may dispose of the goods of the intestate in person as at common law 205 34. As if a bastard should die intestate leaving neither wife nor child, 34 How 33. In Courts of probate have authority in this respect as co-tenants with the ecclesiastical Ct in Eng. The ordinary according to the stat 31 Edw 3 is compellable to grant adv^{ce} to the next most lawful friend of the testator 1 Com 261. The next & most lawful friend is construed to mean the next of blood 2 Bla 446. 4 Co 39.

Under this stat it has been decided that the husband is entitled to adv^{ce} to the exclusion of the next of blood, 4 Co 57, 1 Rot 710. 202. In one case it was held that the wife is entitled by virtue of the words next friend, in exclusion to the next of blood 1 Kay 498. When there are several in equal degree the ordinary may grant adv^{ce} to whichever he thinks fit. 202. The stat 21 Hen 8 enlarged the power of the ordinary & allowed him to grant adv^{ce} to the widow of the intestate. When there are two or more in equal degree entitled to adv^{ce} the ordinary may, by virtue of fore mentioned stat. appoint joint or several adv^{ces} with the widow, or he may appoint one or more of them without the widow, or the widow alone 1 Com 261. 202. 2 Bla 496. Sal 36, 1 Kay 78. Sta 532. 11 Geo 3. 1 How 337. 1 Kay 93. The stat 31 Edw 3 & 21 Hen 8 taken together form the basis of the Eng. law upon this subject.

Executors & Administrators.

Even after these statutes the ad^r was not obliged to distribute the surplus, ~~after~~ after the debt was paid among the next of kin, but was entitled to retain it himself 4 Co 135, Godd 253-4, 2 Bl 233, 2 P Wms 449, 1 Bl 515.

This injustice occasioned a note in stat of the 22^d & 23^d Car. 2 called the stat of distributions, which enacted that ad^r after the debts of the intestate were paid, should distribute the surplus among the next of kin to the intestate. But by stat 29 Car. 2 a husband who was ad^r on his wife's estate, was not obliged to distribute the remainder. 2 Bl 515. Therefore a husband who is entitled to administration before ad^r taken out, his ex^r or ad^r is entitled to take out ad^r to the wife, in exclusion to the next of kin. 1 Hbl 169. This is a rule in equity. & the ordinary is compellable to grant such ad^r 3 Atk 546. 2 Co 2. 3 P Wms 381. If a feme covert die intestate, having goods of her testator & unadministered, ad^r must be granted to the next of kin to her testator, not to her husband. 3 Sab 210. Where the intestate leaves prop that is divisible the ordinary may appoint the widow ad^r of one part, & the next of kin ad^r to another part, or he appoint them joint ad^r 1 Rob 908, 1 Shaw 551. 2 Co 4.

As to an entire thing, there cannot be several ad^rs. Sal 236, 2 Ed 104. In determining whom may be ad^r the degrees of kindred are to be computed according to the rule of civil law, you begin at the intestate who is the terminus a quo, & proceed up to the common ancestor, & then down to the person who is in the nearest degree to the intestate. See At 25. 4. On granting ad^r the child is to be preferred to the father, which is an exception to the rule, that, where there are two in equal degree the ordinary may elect to appoint which he pleases. Godd 258, 2 Ser 125, 2 Bl 504, 2 Co 4.

If there be no wife nor husband as the case may be, the children are entitled to ad^r 2 Bl 527, 1 P Wms 41. Com Di.

Parents are the next in order, then brothers & sisters, then grandparents, &c according to the stat of distributions 1 Atk 435, 2 Co 49. 3 Atk 762. On granting ad^r, propinquity of relations is not quantity of blood is to govern 1 Vent 316, 323, 2 Bl 504, 2 Bl 505. 12 Co 99.

It would seem by the stat that representation is not allowed in this instance, 107 but in no case has it been decided otherwise 3 Bag 498. This case they would thin he cannot be law. If there be no husband, wife, or next of kin, or they will not accept according to the custom of Eng. ad is granted to a creditor in preference to any other stranger Lov 5, Sol 88, 2 Bla 575; How 278.

If there be no husband, wife, nor next of kin, the king usually nominates an ad^r by his letters patent, at the ordinary may if he think proper grant ad to such appointee, who becomes trustee for the king Lov 5, 89, Sol 87.

If an Ex^r refuse to act, or if he die intestate, not having fully administered, ad^r must be granted de bonis non cum testamento annexo. & The ordinary is not obliged to grant such ad^r to the next of kin. If there be an Ex^r & a residuary legatee, & the Ex^r refuses to act, or dies intestate, not having fully administered & was not himself the residuary legatee, ad^r must be granted cum testamento annexo, to such residuary legatee, & not to the persons pointed out by the Statute 34 2 Hen 8. Part 219 2 Bla 584. Dyer 372. Godol 236. Show 5. 1 Plu 95.

If the Ex^r & residuary legatee both die before the estate is fully ad^d, ad^r must be granted to the representative of the residuary legatee Godol 236.

In defect of husband, or wife next of kin & creditors, the ordinary may grant ad^r to whom he pleases on this foundation on custom, How 278. Lov 5 3 Bag 497.

The ordinary in such case may appoint a person de colligendum boni defuncti. & the person so appointed will be a trustee to the ordinary & he may appropriate such goods in p^{ro} p^{ri}us 2 Bla 584. So too if the person entitled to ad^r by stat. refuses & the ordinary so appoints, he will be a trustee for the next of kin Ventur 14. Where an infant is Ex^r, or is entitled to ad^r the ordinary is not bound to grant ad^r de bonis non cum testamento annexo to the next of kin to the testator, or intestate but he may grant it to whom he pleases Sol 257. & 104 244. Lov 5. 2 Bla 581. 3. By the stat of 10m. ad^r belongs to the widow or next of kin & the Ex^r or Probate may appoint either, or both jointly, or one to one part & the other to another part & on their refusal to act, or if they are incapable, the

Executors & Administrators.

Ch of Probate may appoint whom he pleases. But here, as in Eng a creditor is generally preferred. It is a question whether a husband is entitled to the assets of his wife, prop. Mr Pierce thinks he is not. R. is of the same opinion. In Con if a person dies intestate, without kin or all his real & personal, belongs to the State, & the Ch of Probate in their several districts may grant admin to whom they please & the person so appointed cannot sell any of the estate, as other ad^r ad^r. but must account for the whole to the Treasurer of the State. In Con. Stat 163. if an Ex^r refuse to act or to give bond for the faithful discharge of his duty, ad^r cum testamento annexo may be granted to the persons appointed by stat to ad^r intestate estates & their refusal, to one or more of the principal creditors or on their refusal or incapacity, to any one whom the Ex^r pleases, but if there be a residuary legatee it must be granted to him, as in Eng.

In this state it is the duty of the Ex^r to prove the will within 30 days after the death of the testator, & on his neglect he incurs a penalty of 17 dollars per month for every month he so neglects. But in Eng he need not present the will for probate till summoned by the ordinary. If he then refuse he is excommunicated for a contempt. 40. 140 Wente 36.

It is a general rule that when a personal or representative dies, the representative of such deceased representative, does not succeed the personal heir of his principle. But to this rule there are exceptions. 2 Bl 576. Goddard 1st. The Ex^r of an Ex^r is the personal representative of his testator, testator. 1 Con 275. 1 Hol 907. Sol 815-2. Bar 385-6.

But the Ex^r or ad^r of an estate is, not the representative of the first intestate. See 6 Wente Ch 19. Swint 396. 1 Hol 907. Goddard 230. 56 & B.

If an Ex^r die leaving two Ex^rs & one of them die, the whole authority devolves to the survivor, if he die not having fully administered, leaving an Ex^r such Ex^r is the representative of Ex^r of the first testator. Sol 311. Sol 127. Bar 418 & 9. 2 Bl 576. 10th. But if the Ex^r die intestate, his ad^r is, not the representative of the testator.

Executors & Administrators.

128

In this case *ad hoc* non of the estate of the testator must be granted. *30 Sol 230, 580 & 1 Mol 477.* The rule then is this; whenever an *ad hoc* intervenes to break the Executorship, the *ad hoc* in such cases is not the representative of the first testator, or in other words the representation in such case, is not transmissible *2 Bla 576. 1 Hy 225. 1 Sol 908.* A special *ad hoc de bonis non*, may be granted, as well as a special original *ad hoc*.

The manner of proving Wills.

In Eng, the ordinary may so officio, cite the Ex^r to prove the will, & if he refuse, he is excommunicated. And it is said that any stranger may cite him, as he possibly may be a legatee, *30 Sol 60. Bac Ab Ex 89.*

Altho there is no time specified in Eng, in which the Ex^r of his own accord must, exhibit a will for probate, yet it seems to be a rule that it is necessary to notify the ordinary that there is such a will within ten months after the death of the testator *30 Sol 63.*

If it be uncertain whether the testator be alive, shewing presumptive evidence that he is dead, will authorise the ordinary to grant probate of the will, viz. if he be dead, the probate will be good until it is impeached, but if he be living it will be void ab initio. *12 Henry 130. 3 B Rep 129, 31.*

In Can, the Ex^r without being cited must prove the will within 30 days from the death of the testator, under penalty of 10 dollars per month. If he is ignorant that he is Ex^r, however, he is excused.

In Eng there are two ways of proving the will viz. in common form, & in 116 form of law. When an Ex^r proves a will in common form, he cites in none of the parties, but makes oath that it is the last will & testament of the testator, but if the probate be controverted, it must be proved in form of law. It may be controverted at any time within 30 years, when a will is proved in form of law, the witnesses next of kin are cited to appear & when sworn are examined *30 Sol 62.* The method of proving wills in Can dire form of law, so far as it respects the examination abridged.

If the Ex^r refuse to act, & aid is granted, every testament in negro, & such others bound to act according to the will. *252 Writ 26. 30 Sol 149.*

Executors & Administrators.

The ordinary may compel the test to prove the will & declare his acceptance or refusal of a will 61. In Con he is compelled to present the will but not to prove it. An Executorship cannot be assigned, tho' it may be transmitted by will 2. Show 352. An Ex^r cannot renounce his office by any matter in pais as by paid declaration, but his refusal must be recorded in the Spiritual St. Warden 37. Moor 372. 2 Ball. 92. 3 Ball 92. If a will cum testamento annexo, be granted the Ex^r refuses by any matter in pais, he may afterwards claim his right & have the ad^{re} reversed. 1 Rol 407. 1 Bro 281.

But if such renunciation be recorded, both the ordinary & Ex^r are bound by it & a will cum testamento annexo, must be granted, Tracy 194. If then he be an Ex^r and one refuses to act & the other accepts, & proves the will the one refusing nevertheless may act as co Ex^r & on the death of him who proved the will, the office will survive to him in preference of the Ex^r of a will. 1 Rol 311. Moor 377. 9 Co 37.

It is a general rule that the probate of one is the probate of all, therefore they are considered but one person in law, & the Ex^r refusal, in such case cannot be raised until after the death of his co Ex^r. Dyer 160. 35 Hen 3 251. 1 Sal 307. 2 Ball 272. 4 Co 38. In all actions brought by the Ex^r who proved the will, the refusing Ex^r must be joined, but in actions brought against him he need not be 9 Co 37. 1 Sal 307. 4 Dyer 156.

111 Any act done by an Ex^r which appertains to his office, is an act done & imputed to his acceptance & he cannot afterwards renounce the office, even if such acts were done before probate of the will 100 141. Hentie 38. 1 Rol 307-17. 2 Bro 121 ant 303. 2 Bro 146. Hentie 39. Dyer 166. Moor 14.

But tho' any act done, which if he were not Ex^r, would make him a trespasser tort, will bind him to the performance of the office, & yet tho'ordin any, if he pleases, may accept his renunciation Hentie 48. 41.

If an Ex^r merely takes possession of the goods of the testator or of a stranger, supposing them to be the goods of the testator (or takes them claiming)

them as his own, this will not be such an act as will oblige him to accept the office 1 Col 917. But if the ordinary grant admⁿ cum testam^{to} unneq^o, by reason of the Ex^r's not appearing to prove the will upon citation & he afterwards appears such admⁿ must then be made in his favor & when 404 of the Ex^r's appears to take the oath prescribed by law, even before probate, he cannot afterwards renounce the office 1 Hen 6 335, for the form of the oath see 2 Ray 363.

2 Manner of granting Administration

Admⁿ must be granted in writing & under seal. 1 Com 263. 1 Show 408. 2 Ray 444. In all cases of granting admⁿ the ordinary must take bonds for the faithful performance of the office & that 1137.

Admⁿ may be granted to two jointly, or severally, but severally of one entire thing; & if one die, the authority survives. In other cases as in powers of atty if one die the power ceases 1 Col 918. Sal 36. 1 W 104. 2 Co 57. 2 Com 263. Whenever one dies intestate, admⁿ must be granted to those entitled to inherit & such an admⁿ is called an original or absolute, admⁿ & the power of the atty, in such case is more extensive, as he acts in his own right, than it is in other cases, when he acts in right of another 1 Com 257. 9 Co 39.

Whence the rightful Ex^r's is out of the realm (an outlaw, or in prison, admⁿ must be granted durante absentia, or while the disability continues. 112 4 Mod 145. 1 Col 918. Sal 42. In 142. C. 112 304. 2 Ray 1071. 2 Sal 23.

If there be a dispute concerning the validity of the will, or who ought to be appointed admⁿ, admⁿ may be granted pendente lite, & in the case of the will, admⁿ cum testamento annexo. The former, held otherwise 2 Hen 4 17. 2 Show 69. In 142. Barn 2 423. Quest 153. 2 P 117. 116 576. Nom 666.

Admⁿ pendente lite, during the continuance of their office, have all the powers of other admⁿ that 417 2 Ray 1071. 2 Show 69. 6 Co 64. 2 P 117. 576. If an Ex^r refuse to act, or if he die before probate, even tho he has administered in part, or if there be a testament without an Ex^r, admⁿ must be granted cum testamento annexo. Sal 304-5. 1 Col 907. 1 Com 257. In such cases the will is to be the guide of the admⁿ 9 Co 37. 46. (a)

Executors & Administrators.

These are called immediate ad^r. But if an Es^r dies intestate & no law giving the will, ad^r de bonis non cum test^o an^o must be granted Sac 304.2. Such an ad^r is entitled to all the per prop^{ty} of the testator, which remains in specie, so that it can be identified & to all debts due to the testator, which have not been altered by the Es^r in his life time Stein 143. Sac 306. 1 & 473. 2 Vent 362. 1 Rol 384. But he is not entitled to money, unless it is the Es^r in his life time, unless such money has been kept separate, so that it can be identified, but it belongs to the representative of the Es^r & the remedy of the ad^r de bonis non is against him Sac 306. 1 No 499. 2 No 362. Before the stat 1764 a 2 if an Es^r sues a debtor of his testator & recovered judgment & died before Es^r taken out, an ad^r de bonis non could not avail himself of such judgment, But by that stat he may have a fiere facias on the judgment. C No 296. Sac 322.3. 1 Ray 1072. 1 W 33. 1 Ld 140. If the Es^r be an infant ad^r must be granted durante minoritate cum test^o an^o. So in the case of an infant ad^r Mentor 307. Godd 102. 1 W 192.3. 5 C 29. 3 No 24. Com 159. such ad^r continues until the Es^r arrives to the age of 17 years 5 Co 19a - Godd 102.

113 If an infant ad^r marry, the power of the ad^r durante minoritate ceases 5 Co 29. 3 No 79. If an infant and an adult are made co es^r ad^r, durante need not be granted, as they both make but one person in law, yet the adult may, he pleases to be out ad^r durante &c, & in suing may still himself such, or Es^r; 2 W 239. 1 W 193. The rule is the same when the co es^r is not married, if he be 17 years of age, perhaps however, he could not take ad^r durante minoritate, 1 W 193. Where an Es^r dies leaving an infant Es^r the ad^r durante minoritate is not the ad^r of the first testator Co 26. 2 W. Ad^r durante is granted for the benefit of the infant Es^r or ad^r, he acts as bailiff, & his power is not so extensive as that of an original ad^r. But he may do any act which is for the benefit of the estate & the infant Es^r, which is in the course of ad^r 5 Co 29. Co 26 714. 3 Leon 103. But he cannot assent to a bequest, there are not assents now left to lay the debts, as an Es^r may, Divid 288. 5 Co 29. He may sue & be sued, 6 Co 7. Co 26 719.

But he can sell assets only for the pay of debts, or where they are disposable. *See note, 1 Bro CC 719. See 278, 576, 29.* An ad^r disavows, unless his ad^r began only cannot lose a term, & even then it will continue no longer than till the 24th of June, at the age of seven years. *Term 1551, 666.*

Repeal of Administrations.

It was formerly held that ad^r could not be repealed by the ordinary in any case whatever; but it is now held otherwise. *1 Sid 179, 1 Keble 46, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.* *See 179, 1 Keble 46, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.* *See 179, 1 Keble 46, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.*

So when ad^r is granted to any other than the residuary legatee, whether 119 is one, & the 24th dies intestate not having fully ad^r. *1 Keble 46, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.*

So when ad^r has been granted upon a false suggestion, ~~the ordinary may~~ ^{in any case} in a case all the parties were not cited on, when they were entitled to that privilege. *1 Sid 179, 1 Keble 46, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.*

So too if the ordinary do not take proper security, or if ad^r be granted within 14 days. *1 Keble 64.*

So when the ad^r becomes a lunatic. *See 153, 1 Sid 173, 1 Keble 84.* So when the person entitled ad^r was incapable, when ad^r was granted to another, & afterwards becomes capable. *4 Burn 226, 179, 1 Sid 372-3.*

Merely granting a second ad^r is said to be a repeal of the former. *1 Keble 466.* *1 Sid 371, 4 Burn 237, 179.* But this the Court doubt. When the objection is that it has been granted to a wrong person, it is void ab initio but voidable only. *1 Ray 644, 10 Mod 646, 179.*

So when there is an actual intestacy, ad^r is granted rightfully, & is after wards repealed upon citation, all subsequent acts done by the first ad^r are good. *1 Mod 277, 280, 179, 43, 179, 383, 179, 411, 179, 466, 179, 396, 179, 466, 179.* But if ad^r be repealed upon appeal to higher authority than the ordinary, & not by him upon citation, all intermediate acts done by the first ad^r between the time of appeal & granting the repeal are absolutely void. *179, 383, 179, 124-30, 179, 216-7, 179, 204.*

Executors & Administrators.

In such cases, however, where the repeal or citation of the ad^r has a
 executor, he may retain for his debt even after his ad^r is repealed.

Sac 38. May 6th 4. But by the stat 13 Eliz. if such ad^r deriving his ad^r
 give away the goods of the intestate, by error, it is void as against creditors
 tho good against the subsequent ad^r 6 Co 18. for 15. If ad^r be wanted
 by one who has no authority, such ad^r is void ab initio. Sac 38.

If an ad^r recovers judgment then ad^r is repealed he cannot afterwards
 take out Eq^y nor can the Ex^r for he is not suing to the record. 12 C. 3.

115 If one die intestate & a forged will produced, & provided the rightful ad^r sets
 the will aside, all lawful intermediate acts done, done by such false
 Ex^r are good. 107. 137. 3. Dumps 125. Inink 380. If a person leave two wills
 the last defeating the former & the first will be proved & afterwards set
 aside by the rightful Ex^r all acts done by the first Ex^r are void. 110 C. 919.
 Com 8. 152. 3 Dumps 130. Upon a repeal of ad^r the first ad^r is accountable
 to the second, for all the assets in his hands, & for all his wrongful acts.
 & his authority then ceases. 2 Sand 137. 6 Co 11. Jul 38.

Such ad^r may be sued as a trespasser as well as a stranger or for intemed.
 liny with the effects of the dec^d. Plow 274. 2. Inst 157. Com 238. 269.

yet so much as he has disposed of the effects of the dec^d in the pay^t of
 debts will be allowed in mitigation of damages. An action in all
 cases of this kind will lie, & some damages must be given. 1 Vent 349.
 2. 338. 1 Ch. Ca 120. Plow 274. But 110 C. 13.

If such ad^r has received a debt due to the testator & given a release yet
 such pay^t would avail the debtor nothing, & would no bar to an action
 by the rightful Ex^r or ad^r. if the pay^t was not voluntary, 110 C. 919. 1 Vent 349.
 1 Com 269. Yet if a debtor pay money upon judgment & Ex^r to such Ex^r or
 ad^r he will not be compelled to pay it again. 2. Brev 411. But 110 C. 13.
 3. 38. 129. 31. I sets of an Ex^r before Probate.

An Ex^r receives all his interest from the will, & not from the probate,
 therefore all the personal effects rest in the Ex^r at the death of the testator.
 Monte 33. Plow 286. Co 1. 6. 2 92. Good 144. 107. 2. 173.

So when there is a reversion of a term of years, he may before probate disclaim, or allow, for rent that becomes due after the death of the testator, the testator, otherwise it stands in the life time of the testator. Ment. 396, 1 Mol 417, 2 Mol 174. So too if he sell the goods of the testator, he may before probate sue for them in an action of debt. Ment. 41. 52.

112

Of Co-Executors.

When there are several Ex^{rs} they are considered but as one person in law, & their interest is joint, entire & indivisible. Godol 134, 1 Rom 296. Therefore, the act or possession of one is the act or possession of all. 2 Mol 347, 1 Mol 347, 1 Mol 424, Ment. 95. So if he release his part of a debt, the whole is discharged. Godol 134. One Ex^r cannot grant over his right to his co-Ex^r because he has the possession already. Dadsh. 1. Neither can one maintain an action of account against the other in a Ct of law, but ^{tho} he may compel him to account for a moiety. 2 Mol 347, 1 Rom 49, 1 Mol 417. & there 396. In an action against Ex^{rs} the Stat. 4th 1st, they may plead different pleas, 3 Mol 120. But it is said by some that they could not do this at common law. Godol 135, 1 Mol 129, 3 Mol 20. A power of atty^y by one, is not the act of all, 3 Mol 120. But the acts of one co-Ex^r do not bind the other, 14th 460, 2 Mol 1. This seems to be do at testy. Godol 134. (A naked power to Ex^{rs} does not survive, but if coupled with an int^t it does. 10th 558, 2 Mol 120. A naked trust cannot be executed by atty^y. 1 Mol 75. b.) If he has been committed upon the goods of the intestate, after ad^{rs} granted the ad^{rs} may sue in their own names, & if the action be released by one it is binding on all. 14th 462. If one of two Ex^{rs} or ad^{rs} die the authority survives to the other. 2 Mol 36. 10th 559, 2 Mol 514, 1 Mol 9. If one or both the Ex^{rs} are residuary legates, & one takes more than his share, the other may sue him in the spiritual Ct^y to recover. Ment. 49, Godol 135. One Ex^r is not liable for the wrongs of his companion & in no case is he liable farther than what he has come to his hands. Godol 136, Ment. 100, 1 Mol 174. Bar M^o Q^u D^o.

yet if two Exors give a receipt for money actually received by one, either is liable, in law to the creditors, for the amount of the whole. But in Chy the one who received only is liable. Sal. 388.

Exors must join to be joined in actions brought by or against them, 9 Co. 37. 118.
Godol 136. the rule 95. Sal 307. 4 De comf 588. If one Exr be sued, he pleads that he has a Co-Exr. without stating that such Exr has administered, such plea is bad. 11 Co. 113. 242. But if one Exr sue alone it is sufficient for the Def to state that he has a Co-Exr without saying he has administered, & such plea goes to the action & Bar. 2 Bl. in note.

If one of several Exrs be sued, & he does not plead in abatement, that he has a Co-Exr. he can never to the advantage of the plaintiff, bar the Ch. Even if one Exr. refuse to act, yet he must be joined in the suit, when the other sues, otherwise he might fail, if the Def. pla he notice of it. 9 Co. 37. Godol 136. In this case altho. they must join, yet these may be a summons & revivance, which destroys the right of the non-acting Exr to release the action, which without such summons & revivance he may. Sal 307. 2 Hec 98. Mentu 96. Co Lib 109. Co Ed 682. If then is one exception to the rule which requires them to join. That if the goods be committed on the subjects while in the possession of one Exr or Adm. it is said he may bring the action alone, as he brings it by virtue of his possession right in his own name & not as representative. 1 Wils 462. Godol 136. Mentu 109. Otherwise he is to be in 3 Leon 207.

Of Executors de son tort.

An Exr de son tort is a person, who without authority, intermeddles with the goods of dead person & does those acts which belong, absolutely to the office of Exr. or Adm. Mentu 171. Godol 90. 2 De comf 99. 2 Bl. Any intermeddling, whatever, is generally speaking, sufficient to charge a person as Exr de son tort, if done without any authority. 2 Wils 577. 5 Co 33-7. Mentu 171. As, acquiring, transferring, or taking possession, of the goods of the dead. Even murthering a Cow, buying debts or taking

a legacy without the consent of the Ex^r or ad^r is, & he sufficient to charge one, as Ex^r de son tort, 1 Rol 4th. Hol 4th. Dyer 16th. Dyer 11th.

119 But a stranger, mar, before probate, or ad^r granted, feed the cattle of the deced^t, pay debts, repair houses, or provide for the children, not with his own money, or take the goods claiming them as his own, without being liable as Ex^r de son tort. Godol. 4th. 2 Bla 507. Dor 57. Dyer 16th.

If one be put as Ex^r de son tort, & he pleads any other plea than ne inquam Ex^r, he shall be charged as such. Godol 4th. Minter 174.

So if the widow take more for her portuonalia, than is necessary for her rank & estate, she may be charged as Ex^r de son tort, 1 Rol 9th. Dyer 16th.

If one take the goods of the deced^t contrary his command, & deliver them to B. B. may be charged as Ex^r de son tort. R. Dyer 97. C. 3 stat 23.

If an executor receive a debt due to the intestate, for the purpose of defrauding creditors, they are both Ex^r de son tort, & the debt is affected in the hands of the release, in favor of creditors. Cro 840th. 4th. So if a man in contemplation of death, make a fraudulent gift, with a design to defraud creditors, the donee may be charged as Ex^r de son tort to the amount of the gift. 1 Rol 574. 7th 147. Cro 274. 2 Dyer 547. (Roof 104 contra)

What acts make one an Ex^r de son tort, is always a quest. of law. R. Dyer 97.

The criterion to determine, is when he acts as if he claimed to be Ex^r, & so on.

Where there has been a probate of the will, nor ad^r appointed, and if the Ex^r has not administered, common acts of intermeddling, as those before mentioned, make one Ex^r de son tort. 5 Co 33th, Sal 213. But if a stranger, after probate or ad^r granted, claim to be Ex^r, or any act done by him, shall charge him as Ex^r, as Ex^r de son tort. 5 Co 34th, Sal 313. 3d 134th.

otherwise if he does not claim to be Ex^r 5 Co 34th. In common acts of intermeddling before probate, he may discharge himself by delivering the goods to the legal representatives, before action brought. 1 Rol 9th. 2d 553. Hobbs 9. 5 Co 33th, Sal 297.

5th. The reason why an Ex^r de son tort is liable to creditors, is, that they know the Ex^r only by his acts. 12 Mod 491. 2 Dyer 299. 2 Bla 507.

Executors & Administrators.

139

An Eq^t de son tort, is liable to all the demands of the executorship, without any of its benefits or advantages. He may be paid, but he cannot sue, nor can he retain for his own debt as another's, *11 Mod 257, 1 Roll 422, 2 Roll 30, 11 Mod 441, 176, 2 de Sh. 146, 137.* If a rightfull eq^t be sued & he has no assets more than sufficient to satisfy his own debt he may plead it in bar to the action, *2 Roll 630.* If an Eq^t de son tort has paid debts with his own money, he may retain so much as he has, against a creditor of equal degree & priority, & must plead this special matter to the action *ib.*

So too if he has obtained letters of administration, & afterwards subseque-
ent to his payment of the debt, he may still be sued as Eq^t de son tort, *was.*
11 Mod 421, 186, 188, 189. 11 Mod 507, 3 Roll 423, 11 Mod 114, 11 Mod 102, 11 Mod 573, 811.

An Eq^t de son tort is liable to be sued by the creditors, *11 Mod 257, 1 Roll 422, 11 Mod 441, 11 Mod 114, 11 Mod 507, 11 Mod 441, 11 Mod 114.* It is a general rule that when the Eq^t de son tort is sued by the rightfull Eq^t or ad^r he is not liable, but is sued as a trespasser, *11 Mod 103, 11 Mod 507, 11 Mod 574, 11 Mod 574.*

An exception to this rule, when the lawful Eq^t is a creditor, & sues the Eq^t de son tort for his debt, in case he has not had assets sufficient to satisfy for his debt, in such case he states him Eq^t, & also him self Eq^t, & states facts that has had no assets, *11 Mod 441, 11 Mod 507, 11 Mod 574.* In actions by creditors against the Eq^t de son tort, he is considered as a lawful Eq^t in all cases, *11 Mod 507, 11 Mod 574, 11 Mod 137, 11 Mod 201, 11 Mod 454, 11 Mod 218.*

An Eq^t de son tort is not generally liable, no further than assets have come to his hands, unless when sued he pleads no answer, & it is found against him, & then he is liable to the whole amount of the debt, *11 Mod 441, 11 Mod 472, 11 Mod 257.* But equity will relieve him, *11 Mod 147-8.* The word have pleaded, plane administration, *11 Mod 441.* In actions by creditors against Eq^t de son tort they may plead plan ad^r, & in the last of which in equal, or superior degree, in his estate, *11 Mod 507, 11 Mod 574, 11 Mod 186.* But such plea in an action by the lawful Eq^t's hand, but so much as he has paid shall go in mitigation of damages, *11 Mod 441, 11 Mod 174, 11 Mod 186.*

of the laudful ^{or} has been hindered from having laudful assets sufficient to pay his debt, by the wrongful act of such ^{or} de son tort, the debt which he has paid, in equal, or inferior degree, to that of the laudful ^{or}, shall not be allowed in mitigation of damages. Skin. 247. 5 Co. 30. 2 Bla. 577. 2. West 344. 51. East 116. 2. 4 Bla. 23. Where there is an ^{or} de son tort, & a laudful ^{or}, they may be sued jointly, & each will be liable for the amount of the debt which have come to their hands. Montre 235. But an ^{or} de son tort & an ad^r cannot be joined. An ^{or} de son tort, cannot transmit the office of ^{or} neither can his representatives be sued as the representatives of the first ^{or}, but it is said by will follow the assets into their hands in favor of creditors. 2 Mod 295. Lamb. Pur. 2. 2 191. And in the stat^e enact, that if any person shall alienate, or embezzle, the goods of the dec^d, he shall be liable as ^{or} de son tort. Stat 164. The stat^e has pointed out no mode to proceed against him; therefore it remains as at common law. But W. Gould is of opinion that such an ^{or} cannot exist in this state, until the ^{or} in ad^r is precluded from representing the estate insolvent, if at all. And the reason he gives, is, that in case of insolvency our stat^e has provided, that the estate shall be averaged among the creditors. Now if one might sue a man as ^{or} de son tort, as the proceedings are at common law he must recover his whole debt, & defeat the equitable law of average, which our st^e will never depart from. But when the laudful ^{or} or ad^r is precluded by the stat^e limitations, from representing the estate insolvent, this civil will not then exist, because the laudful ^{or} or ad^r will then be liable themselves, to the whole amount of the debt, whether the estate be insolvent or not, therefore no average law would be defeated by suing one as ^{or} de son tort. Where one gives his prot to another to deprive a creditor, after his death, the donee may be sued as ^{or} de son tort. But W. Gould thinks that Equity, if applied to avoid perjury to average law

See, aced.

With respect to real prop^y that is devised, vests immediately in the heir upon the death of the testator so in case of an heir, without the intervention

of an exor. But legacies & bequests of personal estate in the residue of his estate must be obtained before they can come into the possession of the legatee & in case a man makes no will, the law makes one for him, the devise therefore is the distributee of his testamentary legacies, & the act of legal legacies. The law is annexed to the heir, as before observed liable however, to the specialty as to, in respect of personal property. So also in this state it vests in the heir, but he is liable to be divested of it by order of probate, for the part of assets. It was anciently held that, when a testator did not dispose of all his property that the Exors were entitled to the surplusage, after debts & legacies paid, but now they consider him as a trustee, holding the residuum, as an advance to the whole estate for the benefit of the next of kin & in whenever it appears from any circumstances in the will, (as by a legacy given to the Exors) that it was the intention of the testator, that he should not have the residuum, he shall not have it 1 P. Wms 554. 2 Atk 220. 1 Ves 478. 2 Atk 787. 1 Sha 578. 3 Bro 413. 4 Atk 242. 1 Ves 411. 162. As this is an equitable presumption, proof of fact may be introduced to show the testator intended that he should have the surplusage, 2 Atk 68. 1 Pitt 313. But if there be no legacy, proof cannot be introduced to show that the testator meant that the Exors should not have the residuum. Legacies are of four kinds, viz. Sapsed, vested, pecuniary, & Specifics. Legacies happen in two cases, 1. When the legatee dies before the testator, 2. 2. When the legacy is given to one who he arrives at certain age, & he dies prior to that time, 1 P. Wms 892. But if money given him to be paid, when he arrives at that age it would be a vested legacy, or if it was given to him when he arrived at that age with interest annually, it is a vested legacy, or if it be limited over. 1 Atk 418. 2 Atk 673. But if a legacy be charged upon land to be paid by the heir, or devisee, whether it be debentum in potestate, or debentum in presenti, solves again in question, & The legatee dies before he time it is a charged legacy in all cases whatever. 2 Atk 276. 1 Atk 484. 513. In case if a legacy be devised to a child or grandchild of the testator, & at the time the testator, having issue, living at the time of the testator's death, such issue will take the legacy, unless after, nisi provided by the will. 1 Atk 548.

123

123 impaired legacy is one which vests to the estate of the testator, & will be disposed
 as undivided prop^y. but it will pay ~~as~~ ^{as} a residuary claim & pro Ch 1757.
Impaired legacy is one which upon the death of the testator goes to his
 representatives, & specific legacy is one which can be identified, & can
 distinguished from every thing else. If it be destroyed, accident the lega-
 cy must bear the loss. the specific legacies must always be paid first.
 A pecuniary legacy is a certain sum of money given from the bulk of
 the testator's estate, which cannot be identified. If there are not assets
 sufficient to pay all the debts & legacies, the pecuniary legacies must
 abate proportionally. If all the pecuniary legacies are not sufficient
 to pay the debts, the specific legacies must be taken for that purpose, & the
 Ex^r may take which of them he pleases, & the others will not be obliged to con-
 tribute. 11 Johns 422. 11es 31. 2d 111. This is contradicted in 2 Ch 171. but
 to keep the former authorities consistent, & the testator give sev-
 eral pecuniary legacies, & order that one of them be paid first & there is not
 enough to pay the debts & debts & legacies, such legacy shall abate in
 proportion, not with standing it was to paid first, 2d 31. 96. 3d 111 100.
 So too, after the debts are paid there should not be enough to pay all
 the legacies, they must abate in proportion. When the surplus of the prop^y
 after the debts are paid is given in specific legacies, & there is a pecuni-
 ary legacy charged upon them, it must be paid before the specific leg-
 acies are taken, pro Ch 392. If a specific legacy be taken to pay
 debts, when there is prop^y sufficient, without it, the legatee may rec-
 over the value of it from the Ex^r. Or if there be a residuary legatee
 & the Ex^r has paid him the residuum, he may proceed against the
 residuary legatee, pro Ch 393. This by application in Chancery, suit
 at law in Con. An Ex^r is under no obligation to pay a legacy
 unless security be given to refund, if debts should arise, & unless
 he do take security, if there be a deficiency of assets, he must
 pay it himself, & cannot recover it from the legatee, unless he
124 was ignorant of the debt at the time of paying, the legatee owes

Executors & Administrators.

unless it appear to have been the intention of the testator to make it so he it may
 384, 2 Dec 68, 118, Be Ch 262, 1 Nov 68. It has been disputed whether where
 there are two legacies in the same will, in totidem verbis, it shall
 be considered as accumulative or one & the same legacy, but it is now
 settled that if it be given twice in the same instrument, it shall
 be intended as one only, but if it be given in a codicil in totidem verbis,
 it shall be accumulative, 1 H. Ch 390.

When Legacies are to be paid.

It is a general rule that, when no time is specified in the will for the
 payment of a legacy, the Ex^r has one year to pay it in. If there be a vested
 legacy to be paid at a future time, & the legatee dies before that time, his
 representatives cannot claim it before the time when it would
 have been paid to him. But if the legacy had been limited over, in case
 he died, it would be payable immediately on the death of the first lega-
 tee. Sal 418, 1 Nov 25, 26, 1 Pop 104, Be Ch 161.

In the case of adult legatees, they must make a demand of the Ex^r after
 the year is expired, before they can sue him, or before their legacies will
 carry interest, &c. Ch 11. But in the case of an infant legatee, no deman-
 d necessary to make the legacy carry interest. So if given to a charity, 1 H. Ch 38.
 The reason is that the Ex^r is an officer, rather than a debtor. It is more, sel-
 ction in Con that every liquidated debt carries interest from the day of pay-
 ment, whether there be a demand or not. (The case of legacies is an exception.)
 In case of a legacy given to a child by a parent, or any one, in loco pa-
 rentis, to be paid at a future day, it carries interest from the expiration
 of one year, if there be no other provision for the child.

If a legacy be given to a minor, it is to be paid to the legatee on his arriving
 at full age, & it may be paid for his support during minority, or if it be
 to settle it may be paid to him, &c. Ch 26. But in case it is paid to any other
 for him, the Ex^r is liable to pay it again, on his arriving at full age.
 But the Ex^r on applying to Ch will be allowed the principal to the parent
 or guardian. If a legacy be given to a feme covert, it is to the husband.

Executors & Administrators.

145

It must be paid to him, & if paid to the wife the testator must pay it over again unless it were given to her sole & separate use, or the testator used some expressions indicative of this intention that it should be for her sole use. 2 Nov 684. A legacy is barred by no plot of time, but length of time & concurring circumstances may be a bar. 1 Nov 256. It is a rule that the legatee cannot take a legacy without the consent of the testator. If he refuses, the legatee may sue him for a breach of trust, & recover, but not on the ground of prop. What shall be evidence of assent, vide 4 Nov 185 to 29.

If a legacy be given upon a condition which is unlawful, or in violation of the law, is good, & the condition void. But the condition be in restraint of marriage generally, or not to marry a person of a particular sect or profession, or that the legatee shall not marry without the consent of B. in these cases the condition is void. 1 Nov 241, 1 Nov 135, 5. But in the last case if the legacy be limited over, & the condition be not complied with, the legacy is gone. 1 Nov 144, 1 & the 572. Broke 585. So if it change a person's 1 Nov 161.

But if there be a condition that the legatee shall not marry under a certain age 1 Nov 20. if that age do not exceed 21 years, or shall not marry a particular person, or shall be married at a certain place, or in a particular church, in these cases the condition must be complied with. A constructive consent to a marriage is sufficient to save the legacy 1 Nov 586. Where the testator was all his per. & prop. which he dies possessed of, & passes on. There doubts the publicity of this. But a gift of all the devisors, real prop. passes only that he was possessed of the time of making the will.

If one give a legacy to the children of A. he having children at the time 127. those born after take nothing, but if he has no children at the time those born after take Broke 476. If a legacy be given to the children of A. & they having none at the time, but have them afterwards, they will take per capita. If given to the children of A. he having none but several children they will take it. 2 Nov 46, 106.

When the testator gives his estate to be divided among his relations it goes according to the stat of distributions. Broke 491, 4 Nov 527, See 251.

Executors & Administrators.

A life estate may be created in her. prop. with remainder over in Eng. but not in Con. Her. prop. cannot be entailed, so those words, which in the gift of real estate, would create a fee tail, gives an absolute prop. in a personnally, see Bla. tit. that was, An estate for life, may be created out of a personal chattle by will in Eng. only died here, with remainder over to any person in esse, or to his heirs & wife for life, then to their eldest son, or other child, whether born during the life of the father or not, or not to rest in him until 21 years of age, but can go no farther. If a person give a legacy to his wife, upon condition that she do not marry, the condition is good, if there be children, otherwise not.

Mode of recovering Legacies.

Common law has nothing to do with it in Eng. If legacies are charged upon land in the hands of the heir or devisee, & they will not pay them, the will decrees a sale of the land, to thin Eng. & on de M. Reue thin is an action at law might be brought against them in this State. Ch. from taking the jurisdiction, in the case of land, where the spiritual Ct. had none, have taken it in all cases of legacies, & the legatee may sue the Ex^r in Ch. as trustee & recover. But in this State the legatee may bring an action at law against the Ex^r, stating that there is such a will that it was proved, that the Ex^r was Ex^r, that he accepted the office, that the P^{ty} was a legatee for so much, that more than a year has elapsed since the death of the testator, that he has made demand & that the Ex^r refuses to pay. The Ex^r in this case cannot plead plene administravit, or full payment, or if there was not assets sufficient to pay the debts without satisfying part of the legacies, & an average has been struck upon them, that he has tendered the average, if an Ex^r has committed a default, the action may be brought for the legacy immediately, or you may sue the Ex^r in common form. If he plead plene administravit, reply a default, & in both cases judgment will go against him *de bonis propriis* Halling's entries, Eng. in Eng. if an Ex^r promise to pay a legacy in writing, he may

he paid at law on the promise & recover in damages, if he has apd. an action will lie on a parol promise, for it is out of the stat. of frauds. I have heard with the just of legacies, & the Ex^r is ordered to sell them for that purpose & he refuses, Ch will compel him, as he is a mere trustee & devise is entitled to the devise instantly upon the probate of the will, & may recover the premises in an action of ejectment, from him in possession. He may appeal from the Ct of probate, if the will be rejected. If any stat any estate in lands may be granted by deed, & will to any person in esse or his immediate issue, to commence in futuro. But if it be granted to one in lail, the descendants of the first donee in lail, will take an estate in fee simple & species of legacy called a donatio causa mortis, is where one in contemplation of death, gives a personal chattle to keep in case of the donors death & is liable to be directed in his recovery. To make such a disposition good there must be a manual delivery of the thing given, or that which is equivalent, & this before witnesses. 2 Jac 45b. If the Ex^r get possession of such gift & refuse to deliver it, he may be sued in trover. If it be necessary to be taken for the pay of debts, & the donee takes it he becomes an Ex^r de son tort. Ch is said that a bond is not a subject of donatio causa mortis, 3 P 11ms 356. But 11 Jac 112 Recd thinks it is. & if the obligor refuse to pay, he may be sued in the name of Ex^r & if he refuse to lend his name he may be compelled. But 11 Jac 214. 1 P 11ms 443. 2 Jac 142.

Bank bills may be given as donatio causa mortis, 2 Bolk. By our law 129 Ex^r as well as ad^r are compellable to give bonds for the faithful discharge of their trust. If the Ex^r in Eng be a suspicious person, the creditor or legatee may apply to Ch, who will order him to give bond, & if he refuse the Ex^r may be granted to another. If a life estate be given in per prop with remainder over, Ch will compel the tenant for life to give an inventory of the goods to be lodged with the master, & in security if necessary, that the poor shall be delivered in ^{or} your plight as the nature of the thing will admit. 3 P 11ms 334. 10 Jac 122.

Executors & Administrators.

It is a general rule that if a creditor make his debt due to the debtor thereby extinguished, but this rule is not to operate to the injury of creditors or legatees. But after debts & legacies are paid, he considers him as a residuary legatee as to his own debt, whether named or not. But Mr. Rees thinks the debt in such case would not be extinguished in this state, but that he would be obliged to discharge it among the rest of him, his own debt as well as the residue of the estate. Adm^r to be in England must distribute the surplus with their own debt. In Eng the order of debts is thus, 1st debts due to the crown after funeral & last sickness debts, 2^d just debts, 3^d debts of specialty & simple contract debts. If an Ex^r pay debts of a lower grade than those of a higher, & there are not sufficient to pay all, he must pay those of a higher grade out of his own estate, & there is no time limited in Eng for the satisfaction of debts. The Ex^r applies to Ch to issue an order, that unless debts are paid within such a time, he may be discharged from his liability to pay them, which is frequently granted. Whenever the Ex^r has equitable assets all the debts must be paid *pari passu* (Proc. 102. 2d. 703. 1st 11th 228. 2^d 11th 5th).

In all cases those who secure their rights by commencing a suit against the Ex^r must be paid before others in equal degree. For the order of debts in the manner in estates are settled in this state. See Stat Con.

136 Of Actions that may be brought by or against Executors.

It is an ancient maxim that *actio personalis moritur cum persona*. But this is not universally true, either in torts committed by, or against the testator, or in actions maintainable by, or against him upon contracts either express or implied. It is a rule universally true, that if the estate of the testator has been benefitted by his tort, or has been diminished by the tort of another whose prof^t has been benefitted thereby, an action may be maintained by or against the Ex^r. In Eng an action of debt will not lie on simple contract Ex^r because in such case the test^r might have waived his law, & so 47. In contract which the law raises, if no benefit accrues to the prof^t of the testator by the contract, except he fulfil it, & the prof^t consists

Executors & Administrators.

149

in the fulfillment of it the Ex^r is not liable for the non fulfillment of it. As if the sheriff neglect to levy an ex^r or to return it on a writ of fieri facias, he would be liable, but his Ex^r would not. For here was no consideration moving from his employer for the fulfillment of the contract, which the law raises on the part of the sheriff, but his reward depends on the Ex^r of it, and as his estate has not been benefited by his laches his Ex^r shall not be liable. But if a man contract to build an house & does not, his Ex^r is liable, for there is a consideration given for the performance of a consideration. At common law if a person commit a tort upon the estate of the testator in his life time & the wrong does him, the Ex^r cannot recover of the Ex^r of the wrong doer, even if the estate of the testator had been injured, but the stat 4 Geo 2 c 11 ¹⁷⁶⁵ gave the stat de probatibus actioe. gave this right. 3 Br. 1st 402. The form of action of tort always dies with the person who committed it & the action to be brought against the Ex^r must be brought on prop. Cov 371. Stat 4 Geo 2 c 11 ¹⁷⁶⁵ as well as Ex^r and

Executors & Administrators.

By stat 29 Car 2 the Executors with an allowance under certain circumstances. In this State they are good if sufficient reason can be assigned which is generally, - - - - - ally, where the person is in extremis, & cannot make a written out. They can be made only of per prop.

Signing of Wills & Debts & Legacies &c.

If a will of per prop be made in the testators own hand it need not be signed or attested. And if the per prop be not sufficient to pay the simple contracts debts, & there is no power given in the will to sell lands, they must be paid And even should there be a power given to sell lands all the per prop. must first be exhausted before they can be sold. (Under specially come, 1791.) This construction is given in part of the will, but as all the children are equally heirs in this state, the rule does not apply. In this state if a power be given in the will to the Ex^r to sell lands he may sell them without the dissolution of the Ct of probate. If a man devise that all his debts shall

Executors & Administrators.

he ^{is} ~~is~~ will ^{be} ~~be~~ then to be ^{for} ~~for~~ which are ^{by} ~~by~~ the ^{stat} ~~stat~~ limitations as well as others 1 Sal 54. 21. 141. On 62 341. Because they consider him as having, raised all advantage of the Stat. If a man make a will & give child a certain sum of money or of lands in his life time advance to such child or legatee the whole or part of the legacy upon the distribution of the estate it will be considered as paid for ^{the} ~~the~~ ^{estate} ~~estate~~. So when there is no will an advancement in money or lands is considered as a part or the whole of the child's portion upon the distribution of the estate. And the rule in Eng. is, if a child would share equally in his father's estate, he must deliver up what he has received in advance, or as it is termed, must bring it into hotch pot. & the whole will be equally divided. But if he refuse to bring it into hotch pot he shall have no part of the remainder. What has been expended on his education is not considered as an advancement in Eng. but is in Con. A marriage settlement made upon any of the issue, is considered both in Eng. & Con. as an advancement. 3 P. Wms 577. An advancement from the mother's estate is not considered as such in the distribution in Eng. 2 P. Wms 558. But Mr. R. thinks it would be here. The rule for distributing per stirpes ^{per capita} ~~per capita~~ among lineals & collaterals, are the same 4 Bla 577. Burn. Dec. 347. Lov 72.

Debtors.

An Ex^r or ad^r is not liable further than he ^{has} ~~has~~ ^{property} ~~property~~ assets. But if an Ex^r neglect the post of the testator, by which it is directed, or converts it to his own use or pays a debt of a lower grade, when there are others of a higher grade existing & a debt ^{owed} ~~owed~~ ^{owed} ~~owed~~ by the ^{stat} ~~stat~~ of limitations in Eng. (see ^{before} ~~before~~ ⁱⁿ ~~in~~ 426) it is a debtant. But Mr. R. thinks, that if an Ex^r take the same care of the testator's ^{estate} ~~estate~~ as of his own, or pays a debt ^{owed} ~~owed~~ ^{owed} ~~owed~~ by the ^{stat} ~~stat~~ limitations it would not be a debtant here. 3 Bl. 427. 11 Nov 578.

In Eng. there are two modes of recovering a debtant. First, an action is brought against the Ex^r as much he pleads as assets. & 2^d ^{the} ~~the~~ ^{rule} ~~rule~~ is a debtant, which if proved, will subject him to the amount of

such decastant, & eq^r will go *de bonis propriis*. Secondly, an action is not against the eq^r as such & he makes no defence. eq^r goes against him, *de bonis heredibus*, *Quella bona* is returned, then a *scire facias* issues, or a decastant suggested on the roll, a writ then issues to the sheriff who with a jury of 12 men makes an enquiry concerning the decastant & their return lays a foundation for an action against the eq^r & judgment is given, *de bonis propriis*, 10. ab. 316. What would be a decastant in Eng. is one here, but the mode of recovery is different.

Here a creditor or legatee who has been injured by a decastant, may sue the bond in the name of the eq^r & probate & the money recovered is equally divided among all. In an action on the probate bond no price is set forth the consideration, 10. ab. 173. In an action on the bond the breach may be stated in the declaration, or come out in the replication. In a suit on the bond, the claimant & allowed the ad^r may be disproof, & the an appeal will lie from the decision of the commissioners report & 10. ab. 140. The debts found due from the estate, by the commissioners will bear interest from that time if there is a sufficiency of assets 10. ab. 142.

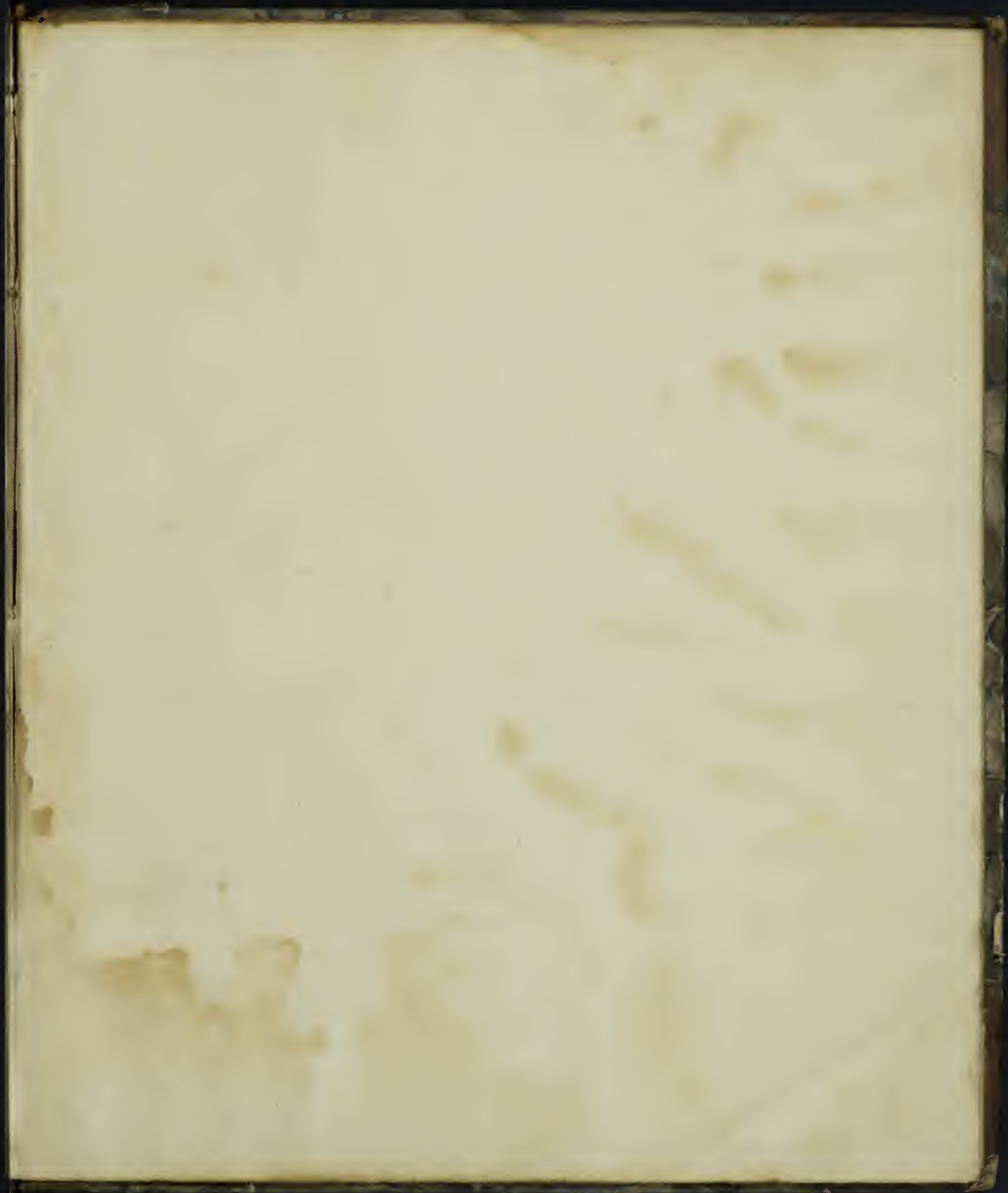
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 soil is very rich. The second is that the
 climate is very healthy, and the
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 food is very good. The fourth is that the
 people are very kind, and the
 country is very beautiful. The fifth is that the
 country is very large, and the
 population is very small. The sixth is that the
 country is very rich, and the
 people are very poor. The seventh is that the
 country is very healthy, and the
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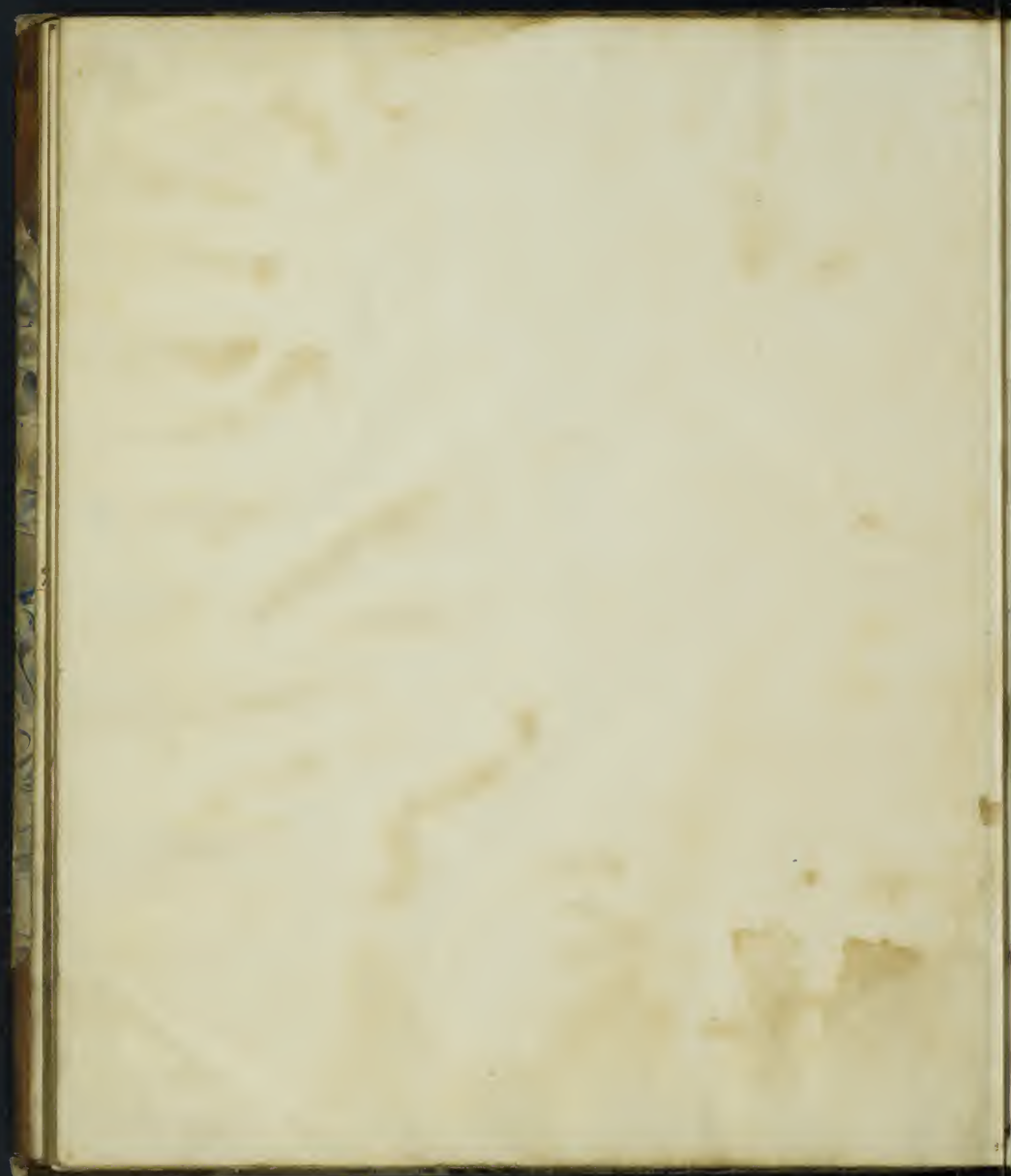
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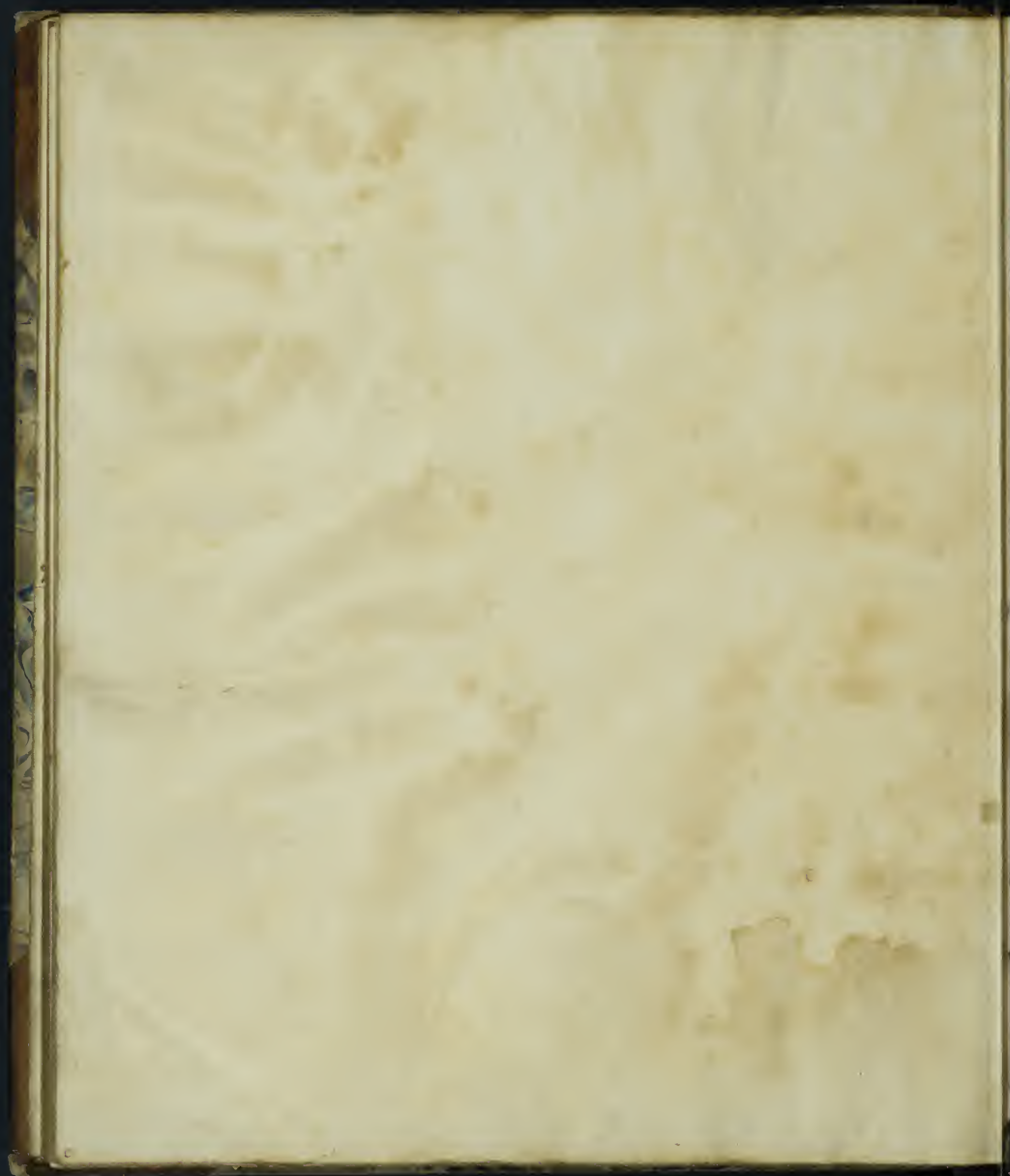
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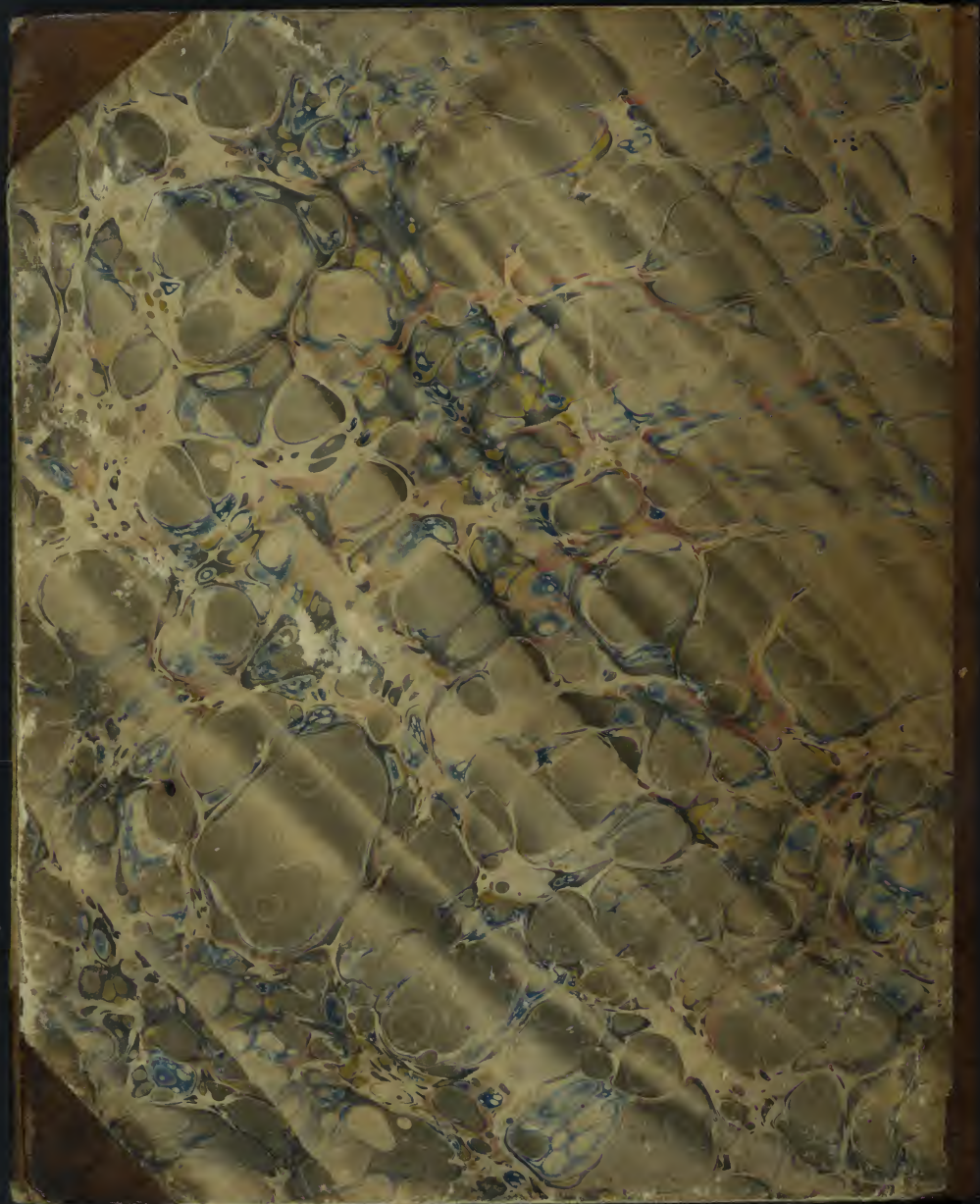












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